SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 967.

DAKOTA CENTRAL TELEPHONE COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, ATTORNEY GENERAL, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

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1 In the Supreme Court of the State of South Dakota.
STATE OF SOUTH DAKOTA, *County of Minnehaha, ss:*

I hereby certify and return that the within Summons, Complaint, Affidavit, Motion and Order, came into my hands for service on the 24th day of January 1919; that on the same day at Sioux Falls, Minnehaha County, S. D. I served the same on the South Dakota State Telephone Company, a corporation, by delivering to and leaving with M. L. Lane, President, true and correct copies thereof. I further certify and return I know the person so served to be the President for said corporation.

HERMAN WANGSNESS,
Sheriff of Minnehaha County, S. D.
By JULIUS WOLD,
Deputy Sheriff.

Sheriff fees:

Summons	60
Copy	25
Complaint	60
Copy	100
Affidavit	50
Copy	25
Motion	50
Copy	25
Order	50
Copy	25
Mileage	40
	$5.10

2 In the Supreme Court of the State of South Dakota.
STATE OF SOUTH DAKOTA, *County of , ss:*

STATE OF SO. DAK., EX REL. BYRON S. PAYNE, AS ATTY General and John J. Murphy, et al. Plaintiff,
vs.
DAKOTA CENTRAL TELEPHONE CO. ET AL., DEFENDANTS.

I hereby certify and return that the hereto attached Summons, Complaint, Affidavit, Motion and Order to Show Cause came into my hands on the 22nd day of January 1919, and that on the 22nd day of January 1919, I served the same upon Dakota Central Telephone Co., a corp. by delivering to and leaving with J. F. Zietlow, General Superintendent for Dakota Central Telephone Co., the within named defendant, personally, a true copy of the hereto attached Summons, Complaint, Affidavit, Motion and Order to Show Cause, and I did

exhibit the signature of E. G. Smith, Judge, on the Original Order at Aberdeen in Brown County, South Dakota.

H. L. ELLIOTT,
Sheriff Brown County, South Dakota.
By ANTON GEISEN,
Deputy.

Sheriff's fees:

Service	$3.00
Copies	1.25
Travel	.40
Total	$4.65

3 *Summons.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation and South Dakota State Telephone Company, a corporation, defendants.

The State of South Dakota sends greeting to the defendants above named.

You and each of you are hereby summonded and required to answer the complaint of the above-named plaintiff, a copy of which complaint is hereunto attached and herewith served upon you, and to serve a copy of your answer upon the subscribers' attorneys for the plaintiff at their offices in the capitol building in the city of Pierre, Hughes County, South Dakota, within thirty days after the service of this summons upon you, exclusive of the day of such service, and you are hereby notified that if you fail to answer the complaint within the time stated, the plaintiff will apply to the court for the relief demanded in said complaint and for its costs and disbursements in this action.

Dated at Pierre, South Dakota, this 18th day of January, 1919.

BYRON S. PAYNE,
Attorney General.
OLIVER E. SWEET,
Assistant Attorney General.
P. W. DOUGHERTY,
Attorneys for plaintiff.

4 *Complaint.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation and South Dakota State Telephone Company, a corporation, defendants.

The above-named plaintiff, the State of South Dakota, on the relation of Byron S. Payne, as attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, complains, alleges, and shows to the court:

I.

That Byron S. Payne is the duly elected, qualified, and acting attorney general of the State of South Dakota, and that John J. Murphy and P. W. Dougherty are, and each of them is, a duly elected, qualified, and acting railroad commissioner of the State of South Dakota, and that collectively they are and constitute the Board of Railroad Commissioners of the State of South Dakota; and that the said Byron S. Payne, as attorney general, and the said John J.
5 Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, bring this action under and by the authority of the statutes and laws of this State, for and on behalf of all the people of this State.

II.

That the Dakota Central Telephone Company is a corporation organized and existing under and by virtue of the laws of the State of South Dakota and has and maintains its principal office and place of business at Aberdeen, in the State of South Dakota; that the Northwestern Telephone Exchange Company is a corporation organized and existing under by virtue of the laws of the State of Nebraska and has and maintains its principal office and place of business at Omaha in the State of Nebraska, and is authorized to transact business as a foreign corporation under the laws of and within the State of South Dakota; that the Nebraska Telephone Company is a cor-

poration organized and existing under and by virtue of the laws of the State of Nebraska, and has and maintains its principal office and place of business at Omaha in the State of Nebraska, and is authorized to transact business as a foreign corporation under the laws of, and within the State of South Dakota; that the South Dakota State Telephone Company is a corporation organized and existing under and by virtue of the laws of the State of South Dakota, and has and maintains its principal office and place of business in the city of Sioux Falls in the State of South Dakota; that each of the said defendants is a common carrier engaged in the transmission of long distance or toll telephone messages between points wholly within the State of South Dakota, and as such common carrier is subject to the laws of the State of South Dakota.

III.

That the Board of Railroad Commissioners of the State of South Dakota, is an administrative body created by law and authorized by the statutes of this State to supervise and regulate the business, property, and affairs of all telephone companies transacting business in said State; that under and by virtue of the provisions of section 2 of chapter 289 of the Session Laws of 1909 as amended by chapter 218 of the Session Laws of 1911, the said board is given general supervision and control over all telephone lines and exchanges constructed and operated in the State and by said section is required to inquire into any complaints of unjust discriminations, neglect, or violation of the laws of the State governing telephone companies, and is given power to fix individual rates, as well as to make schedules of maximum rates, including joint rates to be charged by any telephone company or companies for the rent of any line or instrument or for the transmission of any message and for any service in connection therewith, and to make such changes therein from time to time as it may deem reasonable or necessary, and to exercise any other power necessary to a proper supervision and control of such telephone companies; that, under the provisions of section 4 of chapter 289 of the Session Laws of 1909, as amended by chapter 218 of the Sessions Laws of 1911 of this State telephone companies are required before commencing to charge, collect, or receive any rate or charge for the transmission of any message, or for any service in connection therewith, to file with the Board of Railroad Commissioners a full, true, and correct tariff showing each such rate or charge; and by section 5 of said chapter 289 of the Session Laws of 1909, as amended by chapter 218 of the Session Laws of 1911 of said State that a public hearing should be held after giving ten days' notice thereof to the company or companies and any persons interested therein, before the Board of Railroad Commissioners shall make any individual rate or schedule of maximum telephone rates; and that by section 6 of said chapter 289 of the Session Laws of 1909, as

amended by chapter 218 of the Session Laws of 1911, every telephone company doing business in the State is required to file with the Board of Railroad Commissioners schedules or tariffs showing all rates and charges for the rent of any line or instrument and for the transmission of messages and any service in connection therewith between all points in this State, and all rules and regulations that in any manner affect such charges; and by the said section it is further provided that every telephone company shall file with the Board of Railroad Commissioners a copy of all proposed changes in any schedule of rates or charges at least thirty days before the same shall take
7 effect; and that no rate or charge for the transmission of any message, or for any other service in connection with any telephone line or exchange, shall be increased without the written consent of the Board of Railroad Commissioners, entered in the journal of its proceedings; and by the provisions of section 10 of chapter 207 of the Session Laws of 1911, as amended by chapter 304 of the Session Laws of 1913, it is provided among other things, that every telephone company shall print and keep for public inspection schedules showing the rates for the transmission of messages by telephone in this State which have been established and which are in force upon its lines, which schedules shall state any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such rates or the charges resulting therefrom; that no advance shall be made in the rates, fares, and charges or in the joint rates, fares, and charges which have been established and published by any telephone company in the manner aforesaid, or which had been established or ordered into effect at the time said act took effect by the Board of Railroad Commissioners, except after thirty days' notice to the Board and to the public as provided in said section, plainly stating the changes proposed to be made in the schedule then in force and the time when the increased rates, fares, and charges are desired; and by said section it is further provided that no such change in rates, rules, regulations, or practices shall go into effect until allowed by the Board of Railroad Commissioners, and that when any such telephone company shall have established and published its rates, fares, and charges in compliance with said section it shall be unlawful for such telephone company to charge, demand, collect, or receive from any person or persons, a greater or less compensation for the transmission of messages by telephone, or for any service in connection therewith, than those specified in such published schedules of rates, fares, and charges as may at that time be in force; that by the provisions of section 16 of said chapter 207 of the Session Laws of 1911, as amended by chapter 262 of the Session Laws of 1915 of this State, provision is made for instituting investigations before the Board of Railroad Commissioners by filing complaints against any rate, rule, regulation, or practice established and in effect for the transmission of telephone messages, or for any service in connection therewith, and by the said section, as amended, it is further provided that

8 the board of Railroad Commissioners shall by the same power and authority proceed with an inquiry instituted on its own motion as though it had been appealed to by a complaint or petition, including the power to make or enforce any order or orders relating to or concerning any matter or thing upon which the inquiry is had.

IV.

That pursuant to the laws of the State of South Dakota the defendant telephone companies have, with the consent and approval of the Board of Railroad Commissioners of this State, established and now have in force and effect, schedules of rates, fares and charges for the transmission of telephone messages and for all services in connection therewith between points within the State of South Dakota, as well as schedules of all rules, regulations, and classifications pertaining to the long distance or toll business transacted by said defendants in this State, all of which rates, fares, charges, rules, regulations, and classifications are subject to complaint by any person interested, and are subject to investigation by the Board of Railroad Commissioners; and that such rates, fares, charges, rules, regulations, and classifications governing and applying to the intrastate long distance or toll service of the defendants have been duly established and published as provided by the laws of this State; and that the Board of Railroad Commissioners of the State of South Dakota is now, on its own motion, engaged in a state-wide investigation into the reasonableness, justness, and propriety of the long distance or toll rates in effect for the intrastate transmission of telephone messages by the defendant telephone companies in this State, as well as of all of the rules, regulations, and classifications governing or applying in connection with the said rates; and that the said Board of Railroad Commissioners is proceeding with the said investigation, and upon conclusion thereof will, under the powers conferred upon it by the laws of this State, make its final determination fixing and establishing such rates, fares, charges, rules, regulations, and classifications as, in its judgment, shall be just, reasonable, and proper for the transmission of long distance or toll telephone messages, and for all services in connection therewith between points within the State of South Dakota.

V.

That, notwithstanding the provisions of the laws of the
9 State of South Dakota prescribing the manner in which changes or increases may be made in telephone toll rates and charges and wholly disregarding the same and in entire disregard for the power and authority of the Board of Railroad Commissioners in the premises, the said defendant telephone companies, and each of them, as well as many other telephone companies engaged in a small way

in the long distance or toll telephone business in this State, are now proposing and threatening to, and will, unless restrained by the order of this court, establish and put into effect new tariffs or schedules of rates, fares, charges, rules, regulations, and classifications for the transmission of long distance or toll telephone messages between points within the State of South Dakota on the 21st day of January, 1919; and that such tariffs or schedules of rates, fares, charges, rules, regulations and classifications propose entirely new rules and regulations and entirely new classifications of the toll or long distance telephone service, including messages to be known as station to station calls, person to person calls, appointment calls, as well as charges to be known as report charges; and that the said proposed rates and the said proposed rules, regulations, and classifications will result in greatly increasing the existing and established rates, fares, and charges for the transmission of long distance or toll messages, and for services in connection therewith between points within the State of South Dakota; and that the said defendants have not, nor has any one of them, applied to the Board of Railroad Commissioners for authority to make the said increased rates, fares, and charges effective in this State; and that unless restrained by order of this court said defendants, and each of them, will make the said rates, fares, and charges effective for the transmission of telephone messages and for services in connection therewith between points within the State, without having given notice as required by law to the Board of Railroad Commissioners and to the public, and without having procured the approval thereof by the Board of Railroad Commissioners, and without having had the same allowed by the Board of Railroad Commissioners prior to having the same put into effect.

VI.

That as plaintiff is informed and believes and, therefore, alleges for the information of the court, the defendant telephone companies take the position that they have the power and authority to establish the rates which they propose to make effective January 21, 1919, to apply upon the South Dakota intrastate traffic, for the reason that on July 23, 1918, the President of the United States by proclamation took possession and assumed control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including each of the defendant telephone companies, with all the equipment thereof and appurtenances thereto whatsoever, and all materials and supplies, and placed them under the charge of the Postmaster General, Albert S. Burleson, in compliance, as the said telephone companies contend, with authority conferred upon the President under a resolution adopted by the Congress of the United States on July 13, 1918, purporting to confer upon the President, during the continuance of the

war, power to supervise and take possession and assume control of such telephone companies and to operate the same in such manner as might be needful or desirable for the duration of the war; and that as the defendant telephone companies contend the rates which they propose to make effective upon South Dakota intrastate long-distance or toll telephone messages on January 21, 1919, were initiated by the Postmaster General by General Order No. 2495, issued on December 13, 1918, in Telegraph and Telephone Service Bulletin No. 22, under alleged authority conferred upon him by the said resolution of Congress of July 13, 1918, and the said proclamation of the President dated July 23, 1918; and that, as the defendant telephone companies contend, the Federal authority in the making of the proposed long-distance or toll telephone rates must predominate over the State authority to fix and determine rates for the intrastate transmission of long-distance or toll telephone messages between points in this State; and that, as the defendant telephone companies contend, they are, therefore, required by law to establish and make effective the rates as initiated by the Postmaster General and are relieved from any obligation to comply with any of the laws of the State of South Dakota prescribing or relating to the manner in which advances or changes may be made in the intrastate telephone rates in this State; and with reference to this position and these contentions of the defendant telephone companies the plaintiff alleges and shows that the Postmaster General has no power or authority under the said resolution of Congress or under the said proclamation of the President to initiate rates for the transmission of long-distance or toll telephone messages between points wholly within the State of South Dakota, or
11 between points wholly within any other State; and that, on the other hand, it is expressly provided in the said resolution of Congress dated July 13, 1918, that: "Nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications or the use of stocks and bonds by such system or systems"; and that thereby there was reserved to the State of South Dakota in pursuance of its lawful police regulations the power and authority to establish and regulate by and through its Board of Railroad Commissioners, the rates for the transmission of long-distance or toll telephone messages and for all services in connection therewith between points wholly within the State of South Dakota; and that neither the said resolution of Congress nor the said proclamation of the President conferred any power or authority upon the Postmaster General or upon the defendant telephone companies or either of them, to establish or make effective for the transmission of long-distance or toll telephone messages between points within the State of South Dakota any rates whatever, except for Government communications without complying with the laws of the State of South Dakota and particu-

larly section 10 of chapter 207 of the Session Laws of 1911 thereof as amended by chapter 304 of the Session Laws of 1913 which prohibits any change or advance in the established intrastate telephone rates in this State until thirty days' notice of the fact that such advances or changes will be made, and of the date when the same will become effective shall be first given to the public and to the Board of Railroad Commissioners, and which prohibits the making of such advances or changes unless and until the same have been allowed by the Board of Railroad Commissioners; that the long-distance or toll telephone rates which the defendant telephone companies propose to make effective between points in South Dakota on January 21, 1919, are not intended solely for application to the transmission of Government communications, but are intended for application to all intrastate communications by telephone to be handled by the said telephone companies, including ordinary social and commercial communications between points within this State.

VII.

That the State of South Dakota, in its sovereign capacity,
12 as one of the States of the United States of America, has a direct financial interest in this action in this, to wit, that the State of South Dakota, through its several departments, is a heavy user of the long-distance or toll telephone lines of the defendant telephone companies in long-distance telephone communications between stations in this State over the lines owned and operated by the defendant company; and that the plaintiff is advised and believes, and, therefore, alleges the fact to be, that if the defendant telephone companies be permitted to put into effect the proposed rates, charges, rules, regulations, and classifications which it threatens to put into effect on January 21, 1919, as applying on intrastate long-distance or toll telephone service in this State, the long-distance telephone charges to the State of South Dakota and to the long-distance telephone users of this State will be greatly increased.

VIII.

That the plaintiff is without any plain speedy or adequate remedy at law for the wrongs threatened and complained of.

Wherefore, the plaintiff prays judgment that a temporary injunction be issued by this court enjoining and restraining the defendants, and each of them and their officers, agents, attorneys, and employees, pending the final determination of this action, from putting into effect or applying to, and from charging, collecting, and receiving for the transmission of long-distance or toll telephone messages between points within the State of South Dakota, the rates, fares, charges, rules, regulations, or classifications proposed in the said tariffs or schedules heretofore issued, and to be made effective on January 21,

1919; and that if the said defendant telephone companies shall ever put into effect or charge, collect, or receive any of the said proposed rates that they be restrained, pending the final determination of this action, from continuing to charge, collect, or receive the same; and that upon the trial of this action the issue of an injunction permanently enjoining and restraining the defendant telephone companies, and each of them and their officers, agents, attorneys, and employees from putting into effect, or applying, and from charging or continuing to charge, demand, collect, or receive for the transmission of long-distance or toll telephone messages between any points in this State,
13 rates, fares, charges, rules, regulations, or classifications that will result in rates, fares, and charges greater than the rates or charges for intrastate communication by telephone, long-distance, or toll lines within the State that are now in effect, with the approval of the Board of Railroad Commissioners of this State, or that will result in rates, fares, and charges greater than the maximum rates or charges for such intrastate communication by telephone between points within this State, as the Board of Railroad Commissioners may hereafter approve, allow, fix, or establish after a full investigation in the premises; and that the plaintiff have such other and further relief as to the court may seem just and equitable; and that it be awarded its costs and disbursements in this action.

BYRON S. PAYNE,
Attorney General.
OLIVER E. SWEET,
Asst. Atty. General.
P. W. DOUGHERTY,
Attorneys for plaintiff.

STATE OF SOUTH DAKOTA.
County of Hughes, ss:

John J. Murphy, being first duly sworn, deposes and says that he is a duly elected, qualified, and acting railroad commissioner of the State of South Dakota and is a member of the Board of Railroad Commissioners of this State, and as such is one of the relators in the action entitled in the foregoing complaint; that he has read said complaint, understands the same, and knows of his own knowledge that the same is true, except as to those matters therein stated upon information and belief, and as to those matters that he believes it to be true.

JOHN J. MURPHY.

Subscribed and sworn to before me this 20th day of January, 1919.
[SEAL.] H. A. USTRUD,
Notary Public.

14 *Affidavit.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

STATE OF SOUTH DAKOTA, *County of Hughes, ss:*

John J. Murphy, being first duly sworn, deposes and says that he is a duly and legally elected, qualified, and acting railroad commissioner and a number of the Board of Railroad Commissioners of the State of South Dakota, and that he is one of the relators in the above entitled action; that as such railroad commissioner and in the course of the performance of his official duties he has frequently had occasion to examine the schedules of long distance or toll telephone rates and fares that have been, during the past four or five years, demanded, charged, and collected by the defendant telephone companies above named for the transmission of messages by telephone between points within the State of South Dakota, and that he knows the rates and fares so charged and collected are and have been rates and fares that were and have been from time to time fixed and established in the manner provided by the laws of this State with the consent and approval of the board of railroad commissioners of said State and that many of such rates, fares, and charges and the rules, regulations, and classifications governing same are those which have been fixed and approved by the board of railroad commissioners as a re-

15 sult of investigations conducted by the board.

That during the past six years and more the board of railroad commissioners of this State has continuously exercised jurisdiction and power under the laws of this State to fix, establish, regulate, and otherwise control all telephone companies including the defendants above named so long as each of them has been engaged in business in this State with reference to their rates, fares, charges, rules, regulations, and classifications applying to the transmission of messages and communications over long distance or toll lines and by the use of long distance or toll facilities between points within the State of South Dakota; that there is not now pending before the said board of railroad commissioners any application by the defendant telephone companies for permission to increase any of their rates, fares, charges or rules, regulations or classifications applying to the long distance or toll service of the said companies in this State; that,

however, the board of railroad commissioners is now engaged in an investigation upon its own motion into the matter of the rates, services, and facilities of the defendant telephone companies and other telephone companies with respect to their long distance or toll telephone business within this State, and that the purpose of said investigation is to determine what are and for the future will be just, reasonable, and non-discriminatory rates, fares, charges, rules, regulations, and classifications to apply in connection with and to govern long distance or toll telephone service being rendered by the said defendants and other telephone companies within the State of South Dakota; that the board of railroad commissioners has not yet completed said investigation and has made no report or decision therein.

16 That affiant has been informed by officers of the defendant telephone companies that on the 21st day of January, 1919, they will put into effect and apply for the transmission of long-distance or toll telephone messages between points within the State of South Dakota the rules, regulations, and classifications of toll telephone service as well as the rates to be charged therefor, which are contained in order No. 2495, issued December 13, 1918, by the United States Telegraph and Telephone Administration, under the direction of Albert S. Burleson, Postmaster General, the said order being otherwise known as Telegraph and Telephone Service Bulletin No. 22; that affiant has carefully examined the said order No. 2495 and has compared the regulations and the rates therein proposed to be made effective with the regulations and the rates which now govern the transmission of long-distance or toll telephone messages and communications in this State and that the said order No. 2495, if permitted to become effective, will result in establishing new classifications of toll telephone service, including station to station messages, person to person calls, appointment calls, and report charges which have never been effective in this State, and that the rates proposed to be made effective by the said order No. 2495 and the charges authorized therein will result in very substantially advancing and increasing the rates, fares, and charges of the defendant telephone companies for long-distance or toll telephone service in this State; that as affiant is informed and believes, the said increases and advances in rates and the said new rules, regulations, and classifications are proposed to be established without any investigation as to their propriety or reasonableness when applied to intrastate communications by long-distance or toll telephones between stations in South Dakota and that, as affiant is informed and believes, the rates, fares, and charges that will result if the said order is permitted to become effective will be unjust,

17 unreasonable, and excessive and will result in imposing an improper and unnecessary burden upon the users of long-distance or toll telephone service afforded by the defendants and other telephone companies in this State.

That as affiant is informed and believes the defendant telephone companies are proposing and threatening to make and will make the said advanced and increased rates effective in this State unless re-

strained by order of this court; that as affiant is informed and believes the defendant telephone companies have no authority or power and the Postmaster General has no power or authority to make the said proposed advances and increases in rates effective within this State; that the board of railroad commissioners has never approved or allowed the said proposed rates, fares and charges, rules, regulations, or classifications to be made effective for the transmission of long-distance or toll telephone messages or communications between points in this State, and that the defendant telephone companies, unless restrained by order of this court, will put the said proposed advanced and increased rates and charges into effect without complying with, and in violation of, the provisions and requirements of the laws of this State, and particularly section 10 of chapter 207 of the laws of 1911 thereof, as amended by chapter 304 of the laws of 1913 of the State of South Dakota, which prevent telephone companies in this State, under the jurisdiction of the board of railroad commissioners, from advancing or increasing any rates, fares, or charges that have been established as required by laws of this State, except after thirty days' notice to the board and to the public, published as provided in said section, and which provides further that no change in
18 existing and established rates, rules, regulations, or practices shall go into effect in this State until allowed by the board of railroad commissioners.

JOHN J. MURPHY.

Subscribed and sworn to before me this 18th day of January, 1919.

[SEAL.] H. A. USTRUD,
Notary Public.

19 *Motion.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

Comes now the plaintiff, the State of South Dakota, on the relation of Byron S. Payne, attorney general, and John J. Murphy and

P. W. Dougherty as and constituting the board of railroad commissioners of the State of South Dakota. and moves the court to issue an order to the defendants in this action to show cause why they and each of them and their agents, employees, servants, attorneys, representatives, and all persons acting for and on behalf of either of them should not be restrained and enjoined pending the final determination of this action from putting into effect and applying on and from charging, collecting, or receiving for the transmission of long distance or toll telephone messages or communications between points or stations on lines of the defendant telephone companies wholly within the State of South Dakota any of the rates, fares, or charges, or any of the rules, regulations, or classifications named or contained in the Postmaster General's general order No. 2495 which the defendant telephone companies threaten and propose to make effective in this State on January 21, 1919, and further to show cause why they and each of them, their agents, employees, servants, attorneys, representatives and all persons acting for and on behalf of either of them should not be enjoined and restrained pending the final determination of this action from charging, collecting, or receiving for the transmission of long distance or toll telephone messages or communications between points wholly within the State of South Dakota and rates, fares, charges, or compensation whatever higher than or in excess of the rates, fares, charges, and compensation now in effect in this State, which have been established and approved or permitted to become effective by the board of railroad commissioners in the manner provided by the laws of this State.

And the plaintiff further moves that each of said defendant telephone companies, their agents, employees, servants, attorneys, and representatives, and all persons acting for or on behalf of either of them be, by order of this court, restrained from making any of the said proposed increased rates, fares, charges, rules, regulations, or classifications effective in this State prior to the hearing upon this motion for a temporary restraining order.

This motion is made and based upon the summons and complaint of the plaintiff and upon the affidavit of John J. Murphy on file in this court.

Dated at Pierre, South Dakota, this eighteenth day of January, 1919.

BYRON S. PAYNE,
Attorney General,
OLIVER E. SWEET,
Assistant Attorney General,
P. W. DOUGHERTY,
Attorneys for Plaintiff.

21 *Order to show cause.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION; Northwestern Telephone Exchange Company, a corporation; Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

Upon the complaint of the plaintiff, in the above entitled action and the affidavit of John J. Murphy, a copy of which is hereunto attached, hereby referred to and made a part hereof; and the Court being advised in the premises and good and sufficient cause for this order appearing, now, therefore, on motion of Byron S. Payne, Oliver E. Sweet, and P. W. Dougherty, attorneys for the plaintiff.

It is hereby ordered that the defendant telephone companies and each of them show cause before this court, in the Supreme Court Room, in the Capitol Building, in the city of Pierre, Hughes County, South Dakota, on Tuesday, the 4th day of February, 1919, at the hour of 10:00 o'clock in the forenoon of that day, why they, their agents, servants, employees, attorneys, representatives and all persons acting for or on behalf of them should not be enjoined and restrained pending the final determination of this action from put-

22 ting into effect, demanding, charging, collecting, or receiving rates, fares or charges for the transmission of long distance or toll telephone messages between points wholly within the State of South Dakota that are higher than or in any wise exceed or differ from the rates and charges now in effect, and that have been established with the consent of or allowed to become effective by the Board of Railroad Commissioners of the State of South Dakota, pursuant to the provisions of the laws of said State, and that they likewise show cause why they, their agents, servants, employees, attorneys, representatives and all persons acting for or on behalf of them should not be enjoined and restrained pending the final determination of this action from in any wise changing the existing rules, regulations, and classifications governing transmission of long distance or toll messages between points within the State of South Dakota; and that at said time and place the defendants, and each of them show cause why they, their agents, servants, employees, attorneys, representa-

tives and all persons acting for or on behalf of them, should not be enjoined and restrained pending the final determination of this action from putting into effect and from charging, demanding, collecting or receiving for the transmission of long distance or toll telephone messages between points wholly within the State of South Dakota, any of the rates, fares, or charges or any of the rules, regulations, or classifications which the defendant telephone companies in alleged compliance with General Order No. 2495 of the Postmaster General, are proposing to make effective in this State on January 21, 1919.

It is further ordered, that in the meantime and pending the determination of this order to show cause or until the Court shall otherwise order and direct, the defendants and each of them, their agents, servants, employees, attorneys, representatives and all persons acting for or on behalf of them or either of them be, and they are, and each of them is hereby enjoined and restrained from putting into effect or applying or charging or collecting or receiving for the
23 transmission of long distance or toll telephone messages between points within the State of South Dakota, any of the rates, fares, or charges or any of the rules, regulations, or classifications named or contained in the said General Order No. 2495, issued by the Postmaster General, December 13, 1918, which the defendants propose to make effective in this State on January 21, 1919, and,

It is further ordered, that service of this order be made upon the defendants forthwith, and that the defendants serve upon attorneys for plaintiff their answer or return to this order on or before January 31, 1919, and that the plaintiff serve upon attorneys for the defendants any reply it may care to make to the said answer or return on or before February 4, 1919.

Given at the city of Pierre, the capital, on this 20th day of January, 1919.

By the Court:

E. G. SMITH,
Presiding Judge.

Attest:
[SEAL.] E. F. SWARTZ,
Clerk of Supreme Court.

(Indorsed:) 4526. State of South Dakota, county of Brown, Sheriff's Office, Jan. 22, 1919. Received. H. L. Elliott, Sheriff. ———, Deputy. (1) State ex rel. Payne vs. Dakota Central Telephone Co. et al. Original summons, complaint, affidavit, motion, and order to show cause in re writ of injunction. Supreme Court, State of South Dakota. Filed Jan. 20, 1919. E. F. Swartz, Clerk.

24 *Answer.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL., BYRON S. PAYNE, AS Attorney General, and John W. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

v.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

Now come the defendants and for answer to plaintiff's complaint, admit the allegations contained in paragraphs one (1), two (2), and seven (7) of plaintiff's complaint.

II.

Defendants for further answer admit the allegations in paragraph three (3) and four (4) of plaintiff's complaint, except that defendants alleges that there is no statute or law of South Dakota empowering or authorizing the Board of Railroad Commissioners of South Dakota to supervise and control rates for telephone service on telephone lines or systems operated, controlled and supervised by the President of the United States, acting through and by the Postmaster General of the United States under the several acts of Congress and proclamation of the President, hereinafter more
25 fully set forth.

III.

Defendants for further answer admit the allegations contained in the fifth (5th) paragraph of plaintiff's complaint, except that defendants allege that their disregard of the power and authority of the Board of Railroad Commissioners is due to and on account of and pursuant to the operation of the defendant's telephone properties and systems by the Postmaster General of the United States, pursuant to the resolution of Congress dated July 16th, 1918, and the proclamation of the President in relation thereto dated July 22nd, 1918, and the orders of said Postmaster General in the premises; all of which are more fully hereinafter set forth, and not to any desire, intent, or purpose on the part of these defendants to ignore or disregard the power or authority of said Board of Railroad Commissioners under the laws of the State of South Dakota.

IV.

Defendants for further answer admit the allegations contained in paragraph six (6) of plaintiff's complaint, except that defendants did not take the position that they have the power and authority to establish the rates which they propose to make effective January 21st, 1919, but allege that the proposed rates were prescribed by the Postmaster General of the United States, pursuant to the resolution of Congress of July 16th, 1918, and the proclamation of the President of July 22nd, 1918, as hereinafter set forth, and that the defendant companies intended to apply said rates on and after January 21st, 1919, only because ordered and directed by the Postmaster General of the United States so to do and not by reason of any desire, intent or purpose of these defendants to disregard the power and authority of the Board of Railroad Commissioners of the State of South Dakota, or the laws of the State of South Dakota.

V.

Defendants for further answer allege that on the 16th day of July, 1918, the Congress of the United States adopted a resolution as follows:

"Joint resolution to authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any
26 part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide compensation therefore.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided*, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code:

Provided further, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the State in relation to taxation or the lawful police regulation of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

That thereafter and on July 22nd, 1918, the President of the United States promulgated, published, and proclaimed the following proclamation:

A PROCLAMATION.

"Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them by joint resolution of the Senate and House of Representatives, bearing date July 16, 1918, resolved:

"That the President, during the continuance of the present war, is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange or ratification of the treaty of peace: *Provided*, That just compensation shall be made for such supervision, possession, control, or operation to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per cent, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code: *Provided further*, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the several States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

"And whereas it is deemed necessary for the national security and defense to supervise and take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system and every part thereof,

27

within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

"It is hereby decided that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson. Said Postmaster General may perform the
28 duties hereby and hereunder imposed upon him, so long and to such an extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems.

"Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide that the owners, managers, boards of directors, receivers, officers, and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be.

"Regular dividends hitherto declared, and maturing interest upon bonds, debentures, and other obligations, may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said Postmaster General shall from time to time otherwise by general or special orders determine; and, subject to the approval of said Postmaster General, the various telegraph and telephone systems may determine upon and arrange for the renewal and extension of maturing obligations.

"By subsequent order of said Postmaster General supervision possession, control, or operation may be relinquished in whole or in part to the owners thereof of any telegraph or telephone system or any part thereof supervision, possession, control, or operation of which is hereby assumed or which may be subsequently assumed in whole or in part hereunder.

"From and after 12 o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done by the President, in the District of Columbia, this 22nd day of July, in the year of our Lord one thousand nine hundred and eighteen, and of the independence of the United States the one hundred and forty-third. (Signed) Woodrow Wilson.

"By the President,

"(Signed) FRANK L. POLK,
"*Acting Secretary of State.*"

VI.

That thereafter and pursuant to said resolution of Congress and proclamation of the President, the President, acting by and
29 thru the Postmaster General of the United States, did at twelve (12.00) o'clock midnight, on the 31st day of July, 1918, take possesion and assume the control and supervision, regulation, and operation of all telegraph and telephone properties, lines, and systems in the United States, including all the telegraph and telephone properties owned, controlled, or operated by these defendants, including all equipment thereof and appurtenances thereto whatsoever, and all materials and supplies.

That no part or portion of the telegraph or telephone properties of these defendants, so taken over by the President, or the operation or control thereof, have been relinquished to these defendants or either of them and will not be so relinquished until the date of exchange of ratification of the treaty of peace or until otherwise ordered or directed by Congress.

VII.

That thereafter and prior to the institution of this suit, the just compensation to be paid these defendants and each of them for such supervision, possession, control, and operation by the Postmaster General, during the period of the war, was determined by the President and agreed upon and accepted by these defendants. That by the acts of the United States Government in the premises the defendants, owners of said telephone systems and properties, were divested of their said property for the period of Federal control, except as to the legal title thereto and subject to the provision for just compensation in said joint resolution and proclamation, and the said properties were and now are vested as aforesaid in the United States, in its possession, under its protection and control, and are operated and directed by these defendants only as the officers, agents, and employees of the United States.

The operation of said systems under Federal control has been at all times for the account of the Federal Government, and the defendants have not had any pecuniary interest in the revenues or disbursements, or in the profits or losses of said operation since the period of Federal control began.

That after the Federal control began and prior to the institution of this suit, the defendant companies made and entered into a contract in writing with the Postmaster General fixing the just compensation to be paid for the supervision, possession, control, and operation
30 of said telephone systems and lines, effective as of midnight July 31st, 1918, which compensation is not dependent upon or affected by the financial results of the operation of said systems during the period of Federal control.

That said contract is in writing and is a public document of which this court may take judicial notice. A copy of the contract with defendant Dakota Central Telephone Company is hereto annexed marked Exhibit "B." The contracts with the other defendants are similar in form and substance. Contract with Nebraska Telephone Company dated October 14th, 1918, and with Northwestern Telephone Exchange Company dated October 19th, 1918. No contract has been made with South Dakota State Telephone Company.

VIII.

That thereafter and on December 13th, 1918, the Postmaster General, by order No. 2,495, prescribed the classification and the rates to be in force during the period of Federal control for service over all telephone lines and systems so possessed, operated, and controlled by him, including the telephone lines and systems owned and heretofore operated by these defendants.

That a copy of said order is hereto annexed and marked Exhibit "A" and made a part hereof. That copies of said order were duly filed with the Board of Railroad Commissioners of the State of South Dakota.

IX.

That the Congress of the United States has not made any appropriation or otherwise provided funds with which to pay the expense of operating, maintaining, and supervising the telephone properties so taken over by the President.

That in promulgating and establishing the rates set out in order No. 2,495 the President, acting thru the Postmaster General, claims to be exercising an executive discretion legally confided in him by the law of the United States hereinbefore set forth, and which discretion is not subject to judicial control or interference and to all which the powers and authorities of the several States and their officers are subordinate.

X.

These defendants for further answer allege that this court has no jurisdiction of these defendants, or either of them, or of their officers, agents, or servants, or of the subject of this action, for that, as dedefendants claim, it appears therein that the defendant, their officers, agents, and servants, were and are at all the times herein mentioned and in all matters alleged herein acting as officers, agents, and
31 employees of the United States, in accordance with the laws of the United States, and in respect to the property of the United States under the charge and control of the defendants as such officers and agents of the United States.

That for the protection and preservation of the said property so possessed, supervised, and controlled by the United States the Congress of the United States enacted the following statute:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whoever during the period of governmental operation of the telephone and telegraph system of the United States by the Postmaster General, under the act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or willfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled to receive the same shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both.

"SEC. 2. That whoever shall steal, purloin, embezzle, or without authority destroy any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of any telephone or telegraph system operated by the Postmaster General under the act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"SEC. 3. That whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain any money, property, record, voucher, or valu-
31 able thing whatever of the moneys, goods, chattels, records, or property of any telephone or telegraph system operated by the Postmaster General under the act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, which has been embezzled, stolen, or purloined by any other person, knowing the same to be embezzled, stolen, or purloined, shall be fined not more than $1,000 or imprisoned not more than five years, or both, and such person may be tried either before or after the conviction of the principal defendant.

"SEC. 4. That whoever shall forcibly break into, or attempt to break into, any telephone or telegraph office, or any building used in whole of in part as such telephone or telegraph office, of any telephone or telegraph system operated by the Postmaster General under the Act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President, dated July twenty-second, nineteen hundred and eighteen, with intent to commit in such telephone or telegraph office or building, or part thereof so used, any larceny or other depredation, shall be fined not more than $1,000 or imprisoned not more than five years or both.

"SEC. 5. That whoever shall assault any person having lawful charge, control, or custody of any money or property of any telephone or telegraph system operated by the Postmaster General under the Act of Congress dated July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, with intent to rob, steal, or purloin such money or property, or any part thereof, or shall rob any such person of such money or property, or any part thereof, shall be imprisoned not more than five years; and if in the effecting or attempting to effect such robbery, he shall wound such person having custody of the money or property, or put his life in danger by the use of a dangerous weapon, shall be imprisoned not more than ten years.

"Approved, October 29, 1918."

XI.

The defendants for further answer allege that this court is without jurisdiction in the premises because it appears as defendants
33 claim that this suit is in effect and reality a suit against the United States and plaintiff herein seeks by this suit to control the acts and discretion of the President of the United States in matters confided to him by the acts of the Congress of the United States, and seeks to control, dispose of and regulate the use of property taken over by the President as a war measure under authority of the Congress of the United States and seeks to compel these defendants to violate and disregard the contract heretofore mentioned now existing between these defendants and the United States relating to the operation of said telephone properties as well as the orders and directions of the Postmaster General in the premises and that the United States has not consented to be bound, sued, or controlled in any manner by or in this court; wherefore: defendants pray that the injunction sought by plaintiff be denied.

Defendants further pray that the court adjudge and decree that the Board of Railroad Commissioners of the State of South Dakota are without power or authority to regulate or exercise any jurisdiction over the matter of the rates for telephone service over the telephone lines and systems controlled and possessed by the President of the United States during the war and that the statutes of the State of South Dakota, relative thereto and set out in the complaint herein, are repugnant to and in conflict with the aforesaid laws of the United States.

That it further be adjudged and decreed that the defendant, their officers, agents, and servants are, during the period of Federal control, the officers, agents, and servants of the United States, and as such are subject only to the orders, directions, and control of the Postmaster General and of the President of the United States.

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That the telephone systems and lines involved herein are, during the period of Federal control, in the possesion, control, and under the supervision of the President of the United States.

That the acts of the Postmaster General in promulgating said classification and schedule of rates are and is the lawful exercise of authority conferred upon him by the laws of the United States and the proclamation of the President, and that it is the duty of the defendants as officers, agents, and servants of the United States to apply and enforce such classification and rates during the period of Federal control; and these defendants pray for such other and further relief as may be just and equitable.

34 Dated February 4th, 1919.

EDGAR M. MORSMAN, Jr.,
E. A. PRENDERGAST,
NULL & ROYHL,
Attorneys for Defendants.
R. P. STEWART,
United States Attorney for the District of South Dakota.

STATE OF SOUTH DAKOTA, *County of Beadle, ss:*

W. G. Bickelhaupt, being first duly sworn deposes and says: that he is the secretary of the defendant, the Dakota Central Telephone Company, in the above and foregoing action. That he makes this affidavit for and on behalf of said defendant corporation and on behalf of the other defendants in said action. That he has read said answer, understands the same and knows of his own knowledge that the same is true, except, as to those matters therein stated upon information and belief, and as to those matters that he believes it to be true.

W. G. BICKELHAUPT.

Subscribed and sworn to before me this 5th day of February, A. D. 1919.

Notary Public, Beadle County, So. Dakota.
[SEAL.] W. C. PETERSON,

NOTE: Copy of order No. 2495 attached to original answer as Exhibit "A."

35 (Exhibit "A.")

36 EXHIBIT "B."

Copy.

PROPOSAL FOR COMPENSATION OF DAKOTA CENTRAL TELEPHONE COMPANY TO THE POSTMASTER GENERAL.

(Subject to modification in particular cases.)

Post Office Department, United States of America. Washington, Government Printing Office, 1918.

POST OFFICE DEPARTMENT,
Washington.

Order No. 2288.

The proposal of the Dakota Central Telephone Company, and its subsidiary the Grant County Telephone Company of Milbank, South Dakota, a corporaetion of the State of South Dakota, dated November 23, 1918, with respect to just compensation for the use of the properties owned by it during the period of Federal control provided for in the joint resolution of Congress, approved July 16, 1918, and the proclamation of the President with respect thereto dated July 22nd, 1918, and the Order of the Postmaster General assuming supervision, possession, control, and operation of these and other telephone and telegraph properties, dated August 1, 1918, is hereby accepted on behalf of the United States, and compensation will be paid in accordance with the terms and provisions thereof.

By direction of the President.

A. S. BURLESON,
Postmaster General.

89193-18. Copy.

37 The Dakota Central Telephone Company of Aberdeen, State of South Dakota, a corporation of the State of South Dakota in behalf of itself and its subsidiary, the Grant County Telephone Company, of Milbank, South Dakota, a corporation of the State of South Dakota (which also joins in this proposal), hereinafter referred to as the "Owner," hereby offers to accept a just compensation for the supervision, possession, control and operation of the telephone system of the "Owner" taken by the President of the United States under a joint resolution of the Senate and House of Representatives, dated July 16, 1918, which supervision, possession, control, and operation commenced at twelve (12) o'clock midnight on the 31st day of July, 1918, and is hereinafter referred to as "Federal control," to be fixed as follows:

SECTION I.—MEANING OF WORDS USED HEREIN.

In this proposal the words "Postmaster General" are used to designate Albert S. Burleson or such other person as the President may from time to time appoint to exercise the powers conferred on him by law with reference to Federal control; the words "Commission," is used to designate the Interstate Commerce Commission; the word "Additions," shall be understood to mean additions, betterments, or replacements as defined by the Commission's System of Accounts (including extensions and improvements made through consolidations and purchases), the net cost of which under such system of accounts, is properly chargeable to fixed capital, that is to say, accounts:

No. 100. Fixed capital installed prior to January 1, 1913.

No. 101. Fixed capital installed since December 31st, 1912.

No. 104. Construction work in progress.

Wherever reference is made herein to the System of Accounts of the Commission, it shall be understood to mean the Uniform System of Accounts and Rules for Class A Telephone Companies prescribed by the Commission as such system existed at midnight July 31, 1918.

SECTION II.—PROPERTIES, MONEYS, ACCOUNTS, ETC., COVERED.

The owner's telephone system of which the President has taken such supervision, possession, control, and operation includes:

(a) All of the telephone property operated by the owner as parts of its telephone system, whether owned or leased, and all additions, including those through consolidations and purchases, made thereto during the period of Federal control, except that the owner reserves the right to use during Federal control such portions of office buildings owned by it and now occupied in the operation of its telephone system as may be reasonably necessary to provide accommodations for its corporate organization; and such use of the Federal Telephone System on such terms as the Postmaster General may prescribe.

(b) All materials and supplies on hand at midnight July 31, 1918. As soon as practicable a separate inventory of said material and supplies shall be made and authenticated for him by the signature of such person or persons as the Postmaster General may designate for that purpose, and for the owner by the signature of the president or a vice president of the owner, which inventory when so authenticated shall constitute a part of this proposal.

(c) The net balance as of midnight July 31, 1918, in the accounts shown on the books of the owner and under the uniform system of accounts for telephone companies prescribed by the Interstate Commerce Commission as follows: (1) Number 115, employees' working funds; (2) number 118, due from subscribers and agents; (3) number 119, accounts receivable from system corporations; (4) number 120, miscellaneous accounts receivable; and (5) number 123, other current assets.

(d) Twenty-five thousand dollars ($25,000.00) in cash for working capital, the use of which the Postmaster General is to have during the period of Federal control, without interest, which amount is the amount of working capital which the owner had on hand August 1, 1918.

(e) Any patents or licenses owned or controlled by the owner may be used by the Postmaster General without charge by the owner during the period of Federal control, but the right to such use shall not extend beyond said period, nor shall the use of patented devices owned by other individuals or companies be construed to confer any right upon the owner herein to use or to control the use of such devices after the termination of Federal control; nor shall the use during the period of Federal control of patented devices covered by pat-

ents of the owner or property other than that of the owner be construed to confer the right to continue such use after the termination of such period.

SECTION III.—STANDARD OF OPERATING EFFICIENCY.

During the period of Federal control, the operation of the property of the owner shall be continued at a standard of efficiency relatively equal to that of the past.

39 SECTION IV.—MAINTENANCE, DEPRECIATION, AMORTIZATION, ETC.

(a) During the period of Federal control, through current repairs and maintenance, the property of the owner shall be maintained by the Postmaster General up to a standard relatively equal to that on and prior to July 31, 1918, so that its state of repair and operating condition will be relatively the same at the expiration of the period of Federal control as at its beginning.

(b) In order to make the provision for depreciation and obsolescence relatively equal to that of the past, during the period of Federal control the Postmaster General shall set aside in each year (and at the same rate for each fraction of a year) (1) the sum of one hundred and thirty-four thousand dollars ($134,000.00); and (2) an amount equal to five per cent (5%) of the cost of each addition to the property of the owner during the period of Federal control, including additions made through consolidations and purchases, but excluding intangible capital, rights of way and land; provided, however, that for the purposes hereof said depreciation charge to be set aside as aforesaid shall be conclusively presumed to be adequate and the straight-line method for computing same be assumed; and all compensation defined and provided for hereunder is and shall be based upon the assumption that said depreciation charges are adequate. But should the United States at the close of the period of Federal control acquire the ownership of the property, it is understood that the adequacy of this depreciation charge shall be regarded as an open question.

(c) The Postmaster General shall further make provision for the amortization of intangible capital, right of way and land, and debt discount, including additions to those accounts because of additions as aforesaid to the property during the period of Federal control, upon a basis substantially equal to the established practice of the owner prior to Federal control.

(d) The amounts so set aside shall be credited in monthly installments in accordance with the present established practice of the owner.

(e) The charges affecting construction, maintenance, depreciation, reserves for accrued depreciation and amortization of landed and intangible capital and for the amortization of debt discount shall dur-

ing Federal control be made according to the system of accounts prescribed by the commission.

(f) The reserves for amortization of intangible capital, right of way and land, and for the amortization of debt discount, set up as aforesaid, together with any balance remaining in the depreciation reserve (set up and created as aforesaid), shall first be expended by the Postmaster General for additions, approved by the owner, to the property as and to the extent needed. If such expenditure does not absorb said reserves and balance, then the Postmaster General may divert and use such remaining portion for such purpose as he sees fit, and the United States shall thereupon and thereby become obligated to pay an amount equal to the sum so diverted and used to the owner at the end of the period of Federal control without interest.

SECTION V.—OWNER'S RIGHT TO INSPECT.

(a) The owner shall have the right to inspect its property at all reasonable times during the period of Federal control, and the Postmaster General shall provide reasonable opportunities for such inspection, but such inspection shall not interfere with the operation of the property.

(b) The owner shall have the right at all reasonable times to inspect the books and accounts kept by the Postmaster General relating to the property of the owner or to the operation thereof, and the Postmaster General shall during the period of Federal control furnish to the owner periodically copies of operating reports relating to its property, and as soon as practicable after the end of each fiscal year, the statistical data for such year substantially as heretofore compiled.

SECTION VI.—INJURIES TO EMPLOYEES, ETC.

During the period of Federal control, and until the Postmaster General shall inaugurate a different plan, the owner's plan or practice for compensating employees on account of injury, disability, and death shall be continued. The Postmaster General shall, until the inauguration of such new plan, pay the expense of continuing and administering the present plan or practice, and shall pay any and all amounts upon the terms provided in the present plan or practice for compensating employees as aforesaid.

SECTION VII.—TAXES AND RENTALS.

(a) The owner shall, before they become delinquent, pay all taxes, license fees, and charges (and the expenses of suits in respect thereof), which can or may be lawfully imposed during the period of Federal control by Federal or other governmental authority upon any part of the property described in Section II, hereof, and also

such other taxes, license fees, and charges as during the period of Federal control become the obligations of the owner.

(b) The owner shall render bills to the Postmaster General for such taxes, license fees, and charges as the same are paid, which bills shall be accompanied by receipts of the proper tax collecting officials and shall be paid by the Postmaster General within five days after their rendition, except that said bills shall not include, and the Postmaster General shall not pay to the owner, the portion of such taxes, license fees, and charges properly apportionable to property not taken under Federal control and to the revenue from said last-mentioned property.

(c) If any such tax, license fee, or charge is for a period which began before July 31, 1918, or rontinues beyond the period of Federal control, such portion of such tax, licence fee, or charge
41 as may be apportionable to the period of Federal control shall be paid by the Postmaster General and the remainder shall be paid by the owner. Whenever a period for which a tax, license fee, or charge is imposed can not be definitely determined, so much of such charge as is payable in any calendar year shall be treated as imposed for such year.

(d) During the period of Federal control the Postmaster General shall pay all rentals for property used in the operation of the property of the owner.

(e) Said taxes and rentals shall be allocated between the expenses of operation and capital accounts in accordance with the accounting rules prescribed by the commission.

SECTION VIII.—ADDITIONS TO THE PROPERTIES.

(a) Such additions to the telephone property of the owner's system as may be desired by the Postmaster General and approved in writing by the owner as necessary in order reasonably to provide for the public requirements, giving priority to such requirements for purposes directly relating to the prosecution of the war (including in the word "additions" those made by consolidations or purchases), shall be made (1) by investing the reserves set up for amortization and the unexpended balance of the reserves for accrued depreciation; and after said funds have been exhausted, (2) by investing the proceeds of the issue and sale of securities by the owner, if such sale can be made at reasonable prices: Provided, however, That in case of expenditures made for such additions from funds received from the sale of securities, only four-fifths of the cost of such additions shall be paid from such funds, the Postmaster General agreeing to provide the remaining one-fifth of such cost; or (3) wholly out of funds furnished by the United States. The title to all such additions made in accordance with items (1) and (2) above shall immediately vest in the owner.

(b) Any amounts which the Postmaster General may contribute to or pay for the cost of such additions shall be repaid to him by the owner in twenty (20) equal annual installments; payable, the first installment one year after the expiration of Federal control and subsequent installments annually thereafter until all are paid, with interest from the date of the end of Federal control at the rate of five per rent (5%) per annum, payable annually upon all unpaid balances.

(c) The character, plan, and design of such additions shall be approved by the Postmaster General and the owner. On the
42 15th day of each month the Postmaster General shall render to the owner accurate statements of the cost of all material and labor furnished by him for account of the owner for such construction during the preceding month, which statements shall be based upon and be in accordance with the accounting rules and classifications prescribed for the owner by the commission as existing on July 31, 1918, and as from time to time amended. Upon such accounts there shall be credited any amounts then due and unpaid from the Postmaster General on account of the reserves provided for in paragraph (b) of Section IV, and the balance remaining shall be paid to the Postmaster General on or before the 15th day of the succeeding month.

(d) The owner shall not be required in the first instance to furnish funds for additions not approved by the owner. At the end of Federal control the value of each addition not approved by the owner, for the future use of the owner, shall be appraised by the commission, and at the end of Federal control, but not prior thereto, the title to each of such additions shall pass to the owner, and the amount determined to be its value shall be paid to the Postmaster General by the owner in twenty (20) equal annual installments, payable, the first installment, one year after the expiration of Federal control, and subsequent installments annually thereafter until all are paid, with interest from the date of the end of Federal control at the rate of five per cent (5%) per annum, payable annually upon all unpaid balances.

SECTION IX.—PAYMENTS TO OWNER.

(a) The Postmaster General shall pay to the owner for each year, and pro rata for each fractional part of a year, during the period of Federal control, an amount equal to the sum of the following four items: (1) The annual interest on all outstanding securities and obligations of the owner in the hands of the public; (2) one hundred and twenty-one thousand eight hundred and thirty dollars ($121,830.00); (3) the annual charge for interest and dividends and other costs of securing necessary additional capital for such expenditures as may be made at the request of the Postmaster General; (4) the annual charge for such interest and dividends as the owner may be required to pay on new securities, obligations, or share capital issued for the dis-

charge, conversion, or renewal of present obligations, and for additional interest and charges to secure extension of existing securities or obligations. Any securities or obligation issued by the owner and purchased by and in the hands of trustees shall be treated as outstanding in the hands of the public.

43 (b) The amounts provided for such subdivision (a) hereof shall be paid to the owner in monthly installments on the last day of each calendar month during the period of Federal control, except that installments which have accrued prior to the acceptance of this proposal shall be payable within thirty (30) days after the date of such acceptance; such payments to the owner to satisfy and discharge fully all claims of the owner on account of the amounts so paid.

SECTION X.—RESTRICTIONS ON DIVIDENDS BY OWNER.

The owner shall not declare and pay to its stockholders any dividends in excess of six per cent (6%) on its preferred stock or six per cent (6%) on its common stock annually during the period of Federal control.

SECTION XI.—DEBITS AND CREDITS AS OF AUGUST 1, 1918—ALLOCATION OF ITEMS.

(a) All amounts received by the Postmaster General under paragraph (c) of Section II hereof, and all other amounts, whether received from the owner in cash or collected or realized by the Postmaster General from prepayments and current operating assets belonging to the owner or arising from telephone operations prior to midnight of July 31, 1918, shall be credited by him to the owner; and the Postmaster General shall, to the extent of the cash so received or realized, pay and charge to the owner all expenses arising out of its telephone operation prior to August 1, 1918, and, unless objected to by the owner, may pay and charge to such owner any of such expenses in excess of the cash so received or realized. Balances of the above accounts shall be struck monthly as of the last day of August, 1918, and as of the last day of each calendar month thereafter, on or before the fifteenth day of the next succeeding month, and the cash balance found on such adjustments to be due either party shall be then payable within five days.

(b) Telephone operating expenses and rent deductions shall be allocated with reference to the time when incurred as between the periods prior and subsequent to midnight of July 31, 1918, and between the period of Federal control and the period subsequent thereto, in each instance in accordance with the present established accrual practices of the owner; telephone operating revenues and rent revenues shall be allocated as between the periods prior and subsequent to midnight of July 31, 1918, and as between the period of Federal control and the period subsequent thereto, in each instance in accordance with the present established accrual practices of the owner.

(c) Items included in accounts; (1) number 129, prepaid
44 rents; (2) number 130, prepaid taxes; (3) number 131, prepaid insurance; (4) number 132, prepaid directory expense; and (5) number 133, other prepayments which are subaccounts of account number 128, as prescribed by the commission, shall be allocated as between the periods prior and subsequent to midnight of July 31, 1918, and as between the period of Federal control and the period subsequent thereto, in each instance in accordance with the present established practices of the owner.

(d) There may be used for additions to the owner's property, approved by the Postmaster General, any of the materials and supplies taken over under paragraph (b) of Section II hereof, or purchased by him and held for use in connection with such property, in so far as in his judgment this may be done with due regard to his own requirements. Materials and supplies so furnished shall be charged to the owner at inventory prices in the case of those taken over and at cost in the case of those purchased.

(e) In carrying out of the provisions of paragraphs (a), (b), and (c) of this section, the Postmaster General shall not settle any claim by or against the owner against the objection in writing of the president or any other duly authorized officer of the owner. The conduct of all litigation arising out of such disputed claims or out of operation prior to Federal control shall be in charge of the owner's legal force and the expense thereof shall be paid by the owner, but the Postmaster General shall render to the owner all reasonable assistance in the conduct of such litigation.

SECTION XII.—INTEREST.

All payments to be made by either party under this proposal which are not paid within five days after due shall draw interest from the date of their maturity until paid at the rate of five per cent (5%) per annum.

SECTION XIII.—GENERAL PROVISIONS.

(a) The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during the period of Federal control. He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against it and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or of anything done or ommitted in the possession, operation, use, or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States.

45 (b) The Postmaster General shall save the owner harmless from any and all liability, loss, or expense resulting or incident to any claim made against it growing out of anything done or

ommitted during the period of Federal control in connection with or incident to operation or existing contracts relating to operation, and shall do and perform, so far as is requisite during the period of Federal control for the protection of the owner, all and singular the things of which he may have notice necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by the owner of any of its property, rights, ordinance rights, or franchises, or of its connecting or other contracts involving a facility of operation. The Postmaster General shall also save the owner harmless from any and all claims for breach of covenant heretofore entered into by it or by any predecessor in title or interest in any mortgages or other instrument in respect of insurance against losses by fire.

Nothing in this or in the preceeding paragraph shall be construed to be an assumption by the Postmaster General of, or to make him liable on, any obligation of the owner to pay a debt secured by a mortgage.

SECTION XIV.—EXPIRATION OF FEDERAL CONTROL.

(a) At the end of the period of Federal control all the property described in paragraphs (a) of section II hereof, and also all additions (including those made by consolidations and purchases) to the property of the owner made during the period of Federal control out of unexpended reserves, out of the proceeds of securities, or otherwise, together with all repairs, renewals, and replacements thereof, shall be returned to the owner in a state of repair and in an operating condition equivalent to that of the owner's telephone system on July 31, 1918.

(b) At the end of the period of Federal control the Postmaster General shall return to the owner an equal quantity and quality of materials and supplies of equal relative usefulness to that of the materials and supplies which he received and to the extent that the Postmaster General does not return such materials and supplies he shall account to the owner for the same at prices prevailing at the end of the period of Federal control. To the extent that the owner may then receive materials and supplies in excess of those delivered by it to the Postmaster General, it shall account for the same at the prices prevailing at the end of the period of Federal control, and the balance shall be adjusted in cash.

46 (c) At the end of the period of Federal control there shall be paid to the owner an amount of money equal to the cash working capital without interest received by the Postmaster General from the owner, and also an amount equal to any other cash and special deposits received by him from the owner at the beginning of the period of Federal control and not theretofore accounted for by him, together with any unpaid interest which may have accrued upon the said other cash and deposits under this proposal. There shall be paid

to the owner any funds created under the provisions of this agreement, except to the extent that such funds may have been properly used under this proposal.

SECTION XV.—ACCEPTANCE.

This proposal, if accepted by the Postmaster General, shall be effective on and from midnight July 31, 1918.

Dated this 23rd day of November, 1918.

DAKOTA CENTRAL TELEPHONE CO.
By J. L. W. ZIETLOW.

Form approved.

(Indorsed:) 4526. (2) State ex rel., Payne, Atty. Gen., et al., vs. Dakota Central Telephone Co., et al. Original answer to complaint. Supreme Court, State of South Dakota. Filed Feb. 5, 1919. E. F. SWARTZ, Clerk.

47 *Reply.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

Comes now the plaintiff and in reply to the following portions of the defendants' answer, and without replying to any other part or portion of the said answer, and leaving all such other parts or portions of said answer "deemed to be denied" and in fact denied under the provisions of section 145 of the Revised Code of Civil Procedure of 1903 of this State, says:

I.

In reply to the allegations contained in paragraph VIII of the answer of the defendants to the effect that Exhibit A attached to the answer is a true copy of the Postmaster General's Order No. 2495, made on the 13th day of December, 1918, plaintiff admits the same.

II.

In reply to the allegations contained in paragraph VII of the defendants' answer to the effect that Exhibit B attached to said answer is a true copy of the contract entered into and in force between the Postmaster General and the Dakota Central Telephone Com-

pany; and that the other defendants have entered into contracts of similar form and purport, plaintiff admits the same.

Dated February 11, 1919.

BYRON S. PAYNE,
Attorney General.
OLIVER E. SWEET,
Assistant Attorney General.
P. W. DOUGHERTY,
Attorneys for Plaintiff.

48 STATE OF SOUTH DAKOTA,
County of Hughes, ss:

Byron S. Payne, being first duly sworn, deposes and says that he is the attorney general of the State of South Dakota and is one of the relators in the above-entitled action; that he has read the foregoing reply, understands the same, and knows of his own knowledge that the same is true, except as to those matters stated therein upon information and belief, and as to those matters that he believes it to be true.

BYRON S. PAYNE.

Subscribed and sworn to before me this 11th day of February, 1919.

[SEAL.] H. A. USTRUD,
Notary Public, South Dakota.

Service by copy of the foregoing reply is hereby admitted at Pierre, South Dakota, this 11th day of February, 1919.

E. A. PRENDERGAST,
NULL & ROYHL,
E. M. MORSMAN, JR.,
Attorneys for Defendant.
R. P. STEWART,
United States District Attorney for South Dakota.

49 (Endorsed on back as follows:) 4526. Reply. Supreme Court, State of South Dakota. Filed Feb. 11, 1919. E. F. Swartz, clerk.

50 (Vol. 7.) (Page) 97.

Journal, Supreme Court, State of South Dakota.

32ND DAY.

TUESDAY, FEBRUARY 11, 1919.

Court called at 10 o'clock a. m., all members present and sitting. * * *

STATE, EX REL. PAYNE, ATT'Y. GEN., ET AL.
vs.
DAKOTA CENTRAL TELEPHONE CO. ET AL. } 4526

Called on application for injunction. Argued by counsel and submitted upon the pleadings for final determination.

Recess taken until 1.30 p. m., when session was resumed and argument concluded.

Recess taken until further order of the court.

A true record.

Attest:

E. F. SWARTZ, *Clerk.*

51 S. C. P. C. S. W.

Dissent. J. H. M. E. G. S.

#4526. Granted. "G."

In the Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL., BYRON S. PAYNE AS attorney general, and John J. Murphy and P. W. Dougherty as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiffs.

vs.

DAKOTA CENTRAL TELEPHONE COMPANY ET AL., DEFENDants.

Original action. Opinion filed March 24, 1919.

52 Byron S. Payne, attorney general; Oliver E. Sweet, assistant attorney general; P. W. Dougherty, attorneys for plaintiffs.

Null & Royhl, Edgar M. Morsman, jr., E. A. Prendergast, attorneys for defendants.

R. P. Stewart, United States attorney for the district of South Dakota.

GATES, J. This is an original action brought by the State on the relation of the attorney general and Board of Railroad Commissioners against four telephone companies operating in South Dakota, viz; The Dakota Central Telephone Company; the Northwestern Telephone Exchange Company; the Nebraska Telephone Company, and the South Dakota State Telephone Company. The complaint alleged in substance that the defendants threatened, and were about to put into effect, certain tariffs and schedules of rates, charges, and regulations governing the transmission of long distance telephone messages between points wholly within the State, contrary to and without compliance with the laws of this State in that behalf; and sought injunction. The answer of the defendants admitted the substantial allegations of the complaint but alleged that they were proceeding in accordance with order No. 2495, issued by the Postmaster General of the United States on December 13, 1918, referred to as bulletin 22, made pursuant to the joint resolution of Congress of July 16, 1918, and the proclamation of the President of the United States of July 23, 1918. The cause was submitted for judgment upon the pleadings.

Much has been said in the briefs about the war powers of Congress and of the President, but we are of the opinion that those questions are beside the issues of this case. In our opinion the determi-
53 nation of this case depends entirely upon the meaning of the second proviso in the joint resolution of July 16, 1918. The parts of the resolution material to this case are as follows:

"That the President during the continuance of the present war is authorized and empowered whenever he shall deem it necessary for the national security or defense to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, * * *.

"*Provided*, That just compensation shall be made * * *

"*Provided further*, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

It is contended by plaintiff that the term "lawful police regulations" is there used in its broad sense which includes the power of rate regulation. Chesapeake & Potomac Telephone Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144. It is contended by the defendants that such term is there used in its narrow sense as referring simply to the public safety, health, and morals.

Leaving out of consideration for the moment the two exceptions mentioned therein, we may observe that if by that proviso the Congress intended that the States should continue to exercise their undoubted powers to reasonably regulate the intrastate rates and charges of telephone companies, then the power to fix such rates did not pass to the President nor to his representative, the Postmaster General. If by that proviso Congress intended to deprive the States of the power to regulate rates for intrastate messages then, but not until then, we would have to consider the power and authority of Congress so to do.

54 In our opinion Congress intended the former. The act and the proviso should be so construed unless the contrary clearly appears. The contrary should not be assumed by mere implication.

In Reagan v. The Mercantile Trust Co., 154 U. S. 413, 38 L. ed. 1028, the court said:

"It must have been known that, in the nature of things, the control of that business would be exercised by the state, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the

state, it intended that it should be subjected to the ordinary control exercised by the state over such business."

In Reid v. People of the State of Colorado, 187 U. S. 137, 47 L. ed. 108, the court said:

"It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested."

So that if the clause in the proviso is ambiguous and needs interpretation the doubt should be resolved in favor of the reserved power of the state. But a consideration of the second exception in the proviso removes, in our opinion, all possible doubt as to the intention of Congress. The material parts of the proviso applicable to the point in question are:

"Nothing in this act shall be construed to amend, repeal, impair, or affect * * * the lawful police regulations of the several states, except wherein such * * * regulations may affect the * * * issue of stocks and bonds by such system or systems."

It cannot be doubted that the power of a state to regulate the issuance of stocks and bonds by corporations created under its authority is a power entirely foreign to and outside of those powers included in the term "police power" when such term is used in its narrow sense as referring to the power to preserve public
55 safety, health, and morals. Therefore, when Congress declared that the "police regulations of the several states" left to the states, should not "affect the issue of stocks and bonds" of telegraph and telephone companies, it is clear that it had in mind reserving to the states "police regulations" which, if unrestricted, might affect the issue of stocks and bonds. Thus Congress has, by the very wording of this proviso declared that it reserved to the states, subject to two limitations, the full police powers that the states possess as sovereign states. The term "lawful police regulations" is therefore self-interpreted by Congress and needs no interpretation by the courts.

It is further urged that the assumption of control and operation imply the taking over of all revenues and that by reason of the taking over of the revenues of the companies Congress intended to assume authority to fix all rates, interstate and intrastate. That contention ignores the second proviso of the resolution. The resolution says nothing about the taking over of the revenues. The provisions of the contracts entered into between the Postmaster General and the telephone company are not persuasive of the correct interpretation of the proviso; but even if the act does contemplate the taking over of all revenues interstate and intrastate, that fact is not entitled to weight in construing the terms of the proviso, because that fact would not at all be inconsistent with its dependency on the right of the states to continue to regulate intrastate rates. Intrastate rates, as well as interstate rates, established under the authority of law, are entitled to the benefit of a presumption that they are fair

and reasonable. How can it be said to be inconsistent with the assumption of the revenues for Congress to declare that such assumption was subject to the reasonable rates lawfully established!

56 It is further urged that by the several steps taken by Congress, by the President and by the Postmaster General, the properties taken over have become the properties of the United States Government unshackled from State authority, and that this action is in reality one against the United States which can not be maintained in this Court because Congress has not given its assent thereto. The answer is that even if the property has become the property of the United States Government, the Government's title thereto is encumbered by the reserved power of the State to regulate intrastate rates. When, therefore, the Postmaster General seeks to promulgate rates, and the defendant telephone company seeks to carry them out, in defiance of the State laws, they are wrong-doers and are amenable to the laws of this State. The action is not one against the United States or its property, but is one seeking to restrain the commission of an authorized act.

In the Minnesota rate cases the Supreme Court of the United States very fully went into the question of what were and what were not suits against the State. Ex Parte Young, 209 U. S. 123, 52 L. ed. 714. That decision is authority for the position which we assert.

We are of the opinion that the injunction sought should be granted, but that it shall provide that it in nowise affects the transmission of governmental communications or the issue of stocks and bonds by the defendants or either of them.

57 McCoy, J., dissenting. (Smith, P. J., concurs in this dissent.)

For reasons hereafter stated I am unable to concur in the majority opinion. The majority opinion states that "much has been said in the briefs about the war powers of Congress and of the President, but we are of the opinion that those questions are beside the issues in this case." All the decisions and authorities cited by the majority are applicable only to ordinary normal peace conditions. As I view the situation, in the interpretation of the said resolution and the effect of the proviso therein, my associates have entirely lost sight of the fact that we have been and now are engaged in a war, and that the President and Postmaster General have been and now are exercising discretionary executive war power for the common defense of our country. The whole meat of the interpretation of said resolution should be based upon the war powers of Congress, and the purposes, spirit, and intent, and the object and ends sought to be accomplished by its enactment. 36 Cyc 1110. Much of the argument of plaintiffs, as disclosed by their briefs, is to the effect that the war, for all legal purposes, closed with the signing of the armistice on November 11, 1918. The resolution of Congress in question expressly provides that the Government may retain possession and control of such telephone systems until the ratification of peace treaties shall have been proclaimed by the President. We should take judicial

notice that no such treaties yet have been proclaimed. Aside from the provisions of the resolution, the general common law rule seems to be that it is the province of the political and not the judicial department of government to determine when war, as a legal status binding upon the courts, commences and ends; that courts can not take judicial cognizance of the fact that war has commenced or
58 ended until there has been some act or declaration by that department of government clothed with war making power. Conley vs. Calhoun Co., 2 W. Va. 406; Bishop vs. Jones, 28 Tex. 319; U. S. vs. Palmer, 3 Wheat. 610; 4 L. ed. 471, 40 Cyc 393. As a matter of notorious common knowledge we should take judicial notice that at the present time no proclamation declaring war at an end has been made by the President or other political department of our Federal Government clothed with such power. We should also take judicial notice that this nation now has on foreign soil a large army; that it is now being supplied at enormous cost; that it is as essential now as before the armistice that our Government have funds necessary to care for its army, transport the same home and demobilize the same in orderly course. Revenues and other war service equipment are as necessary now as before the armistice.

It will be observed that the resolution of Congress, partially quoted in the majority opinion, in substance provided that the President, during the continuance of the present war, was authorized and empowered whenever he should deem it necessary for national security or national defense, to take possession and control of any telephone or telegraph systems and operate the same in such manner as might be needful. Needful for what? The only answer is for war purposes. On July 22, 1918, acting under said resolution, the President by proclamation took over into war service the possession and control of each and every telephone system within the jurisdiction of the United States, and placed them under the immediate supervision and control of the Postmaster General, who was thereby authorized and empowered to act in the premises for and on behalf of the President. Thereafter, on July 31, 1918, the President, acting by and through the Postmaster General, took actual physical possession and control of all said telegraph and telephone systems, including the properties theretofore owned, controlled and
59 operated by the defendants within this State, and from thence thereafter the possession, control and operation of said telephone systems have been and now are under exclusive federal control, and defendants have not now any pecuniary interest in the revenues, disbursements, profits or losses of said defendant corporations. Thereafter on December 13, 1918, the Postmaster General, by order, prescribed the intrastate rates to be in force during the period of Federal control on all telephone systems, including those of defendants, which materially increased the intrastate rates theretofore existing within this State. The defendants claim that they intend to apply said proposed intrastate rates only because ordered and directed so to do by the Postmaster General. In promulgating

and establishing said order prescribing said increased intrastate rates, the President, through the Postmaster General, claims to be exercising an executive discretion legally confided in him by the laws of the United States, during the war, as a war measure, and which discretion is not subject to judicial control or interference, and to all which the powers and authorities of the several States and their officers are subordinate. By said resolution, it clearly appears that discretionary executive power was confided in the President to take over for war purposes the entire system of the telephone corporations, including the appurtenant rights to fix rates of compensation that should be paid by the public for service or use thereof; in other words, the President, if he deemed it needful, was empowered to impress into war service, not only the entire equipment, property, officers, agents and employees of said corporations, but also the use and revenues thereof, and any and all other means of every nature appertaining to and possessed by said telephone systems whereby the common defense of the country might be benefited and made more secure. When said telephone systems were taken over by the Government for such war purposes, incidentally, and as an inherent part thereof, the capacity of said systems to produce revenues was also taken over to be used by the President as he might deem needful for common defense. The power of impressment is defined to be that possessed by a government in taking persons or property to aid in defense of the nation with or without the consent of the persons concerned. In this instance, after said taking, many of the telephone corporations consented to the said impressment into war service by contracts made with the Government, while some did not consent thereto; but whether such corporations so consented or not, the effect of the taking over was the same in either case. The impressment into such war service of the use, and the means to thereby obtain revenues from the public, were just as needful and as essential for war purposes as any other use to which the Government might desire to put said telephone systems. From the time of so taking over of said telephone systems they became to all legal intents and purposes the same as if the Government of the United States was and always had been the sole and absolute owner thereof, together with all the incident appurtenant powers of such ownership. When they were so taken over they became completely unshackled from State authority, and thereafter, neither the State, nor its board of railway commissioners, had any further power or jurisdiction over the same, any more than they had over any other solely owned operated and controlled Federal property. When said telephone systems so went into the hands of the Postmaster General, the same and all their various powers and functions, ceased completely to be subject to the police power of this State, otherwise the Federal Government might thereby be hindered and delayed in what it deemed proper and needful war purpose measures. The laws of this State relating to the fixing of intrastate telephone rates never did and do not now apply to United States owned, operated and con-

trolled property. The fact of so taking over said telephone
61 systems and the fixing of increased intrastate rates in no manner conflicts with, repeals or impairs the force and effect of the police power of this State, but such taking over had the effect of removing said systems entirely out of and from under the jurisdiction of the State civil law. The State civil law is as effective now as ever as to property and persons over which it has jurisdiction, but property which has passed under the military jurisdiction of the President is not a subject of police regulation under the State civil law. If the Federal Selective Draft Act, of May 18, 1917, had contained a proviso that nothing in that act should be construed to amend, repeal or impair or effect existing laws or power of the States in lawful police regulation, could any one successfully contend that individuals who had been drafted into war service, on the eve of battle or embarkation, might be imprisoned for violating some civil State police regulation; would it not be held that the drafted person had been taken out of the jurisdiction of the civil law and, for the time being, made amenable only to military law; that no State law had been thereby repealed or impaired as to persons not drafted into Federal war service; would it not be properly held that any other holding would thwart, hinder or delay the very war object for which the soldier had been impressed or drafted into service? Now the Government has impressed private property for the same war purposes. Is it not for the executive department, whose duty it is to prosecute the war, to determine what particular use shall be made of the impressed private property just the same as it may determine what use shall be made of the impressed soldier? Efficient war service was the purpose—the primary object for which the said resolution of Congress was enacted. It authorized the complete taking over of telephone systems. After the same were so taken over it was the province and the duty of the executive department,
clothed with power to prosecute the war, to determine what
62 war purpose use should be made thereof. If such executive department in its discretion determined that it was a necessary and needful war measure to increase the intrastate rates, it was within its executive discretion to do so, otherwise the very war object for which it was taken over might be hindered and delayed and entirely thwarted by civil law courts. The power to determine what use or purpose should be made of said telephone systems and whether or not this thing, that, or the other, was a proper war measure, was within the discretionary military executive jurisdiction of the President as commander in chief of the Army and Navy. When discretionary military power to take over telephone systems, as a part of the process of conducting the war, was so placed in the hands of the President, it then became his lawful province to interpret those powers. Now, in interpreting and construing said power the President, through the Postmaster General, has decided and determined that the said increase in intrastate telephone rates is a proper war measure. I am of the view that such interpretation is supreme and

paramount to any other interpretation that might be made by any civil court. It seems to be well settled that when a state of war exists the exercise of discretionary military power and authority can not be controlled or interfered with by civil courts, unless where it is clearly made to appear that the acts, assumed to be done by virtue of such military power, are in excess and entirely outside of any reasonable military purpose for which the power was given or might be exercised. State vs. Burton, 103 Atl. 962. In re Wulzen, 235 Fed. 362. Druecker vs. Salomon, 21 Wis. 631, 94 Am. Dec. 571. Marbury vs. Madison, 1 Cranch 137, 34 L. Ed. 60. Within its sphere each particular department of the Federal Government, legislative, executive, and judicial, is supreme and paramount. In re Quarles, 158 U. S. 535. These telephone systems having be-
63 come, during the period of the war, Federal property in the hands and under the control of the executive department, the decisions of that department with reference thereto are paramount to that of any other department. In speaking of the exercise of authority essential to be exercised in relation to the common defense, at the time of the creation of our Federal Constitution, Hamilton most appropriately said:

"The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense." Vol. 10, Sec. Ed. Fed. Stats. Ann., p. 300.

Under well-known general rules statutes should be construed in the light of and so as to give full force and effect to the purposes and objects which brought about their enactment.

"Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, * * * and the statute should be given that construction which is best calculated to advance its object." 36 Cyc. 1110.

The President having been authorized to completely take over said telephone systems for military purposes, it would seem to necessarily follow that he alone, as the person appointed to preside over the common defense, should determine what war uses should be made thereof. I am of the view that the general rule announced by this court in State vs. Express Company, 170 N. W. 570, to the effect that an

executive officer of state, such as the President, or governor, is not subject to the control or interference of the judiciary in the performance of discretionary duties belonging to him as such officer,
64 and that no act done or threatened to be done by him in his official executive capacity can be brought under judicial control or interfered with by mandamus or injunction.

Therefore I am of the view that the application of plaintiffs for injunction should be denied.

(Indorsed:) 4526. State ex rel., Payne et al., plaintiffs, vs. Dakota Central Telephone Co. et al., defendants. Original proceeding. Injunction granted. Gates, J. Smith, P. J., and McCoy, J., dissenting. Supreme Court, State of South Dakota. Filed Mar. 24, 1919. E. F. Swartz, clerk.

65 *Certificate of service of judgment.*

F–652.

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA EX REL., BYRON S. PAYNE AS Attorney General and John J. Murphy and P. W. Dougherty as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, North Western Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

STATE OF SOUTH DAKOTA, *County of Hughes, ss:*

I, Henry Walker, deputy sheriff of Hughes County, South Dakota, do hereby certify and return that the annexed judgment of the Supreme Court in the above-entitled action dated March 24, 1919, came into my hands for service upon the 26th day of March, 1919; and that I served the same upon the defendant Nebraska Telephone Company by delivering to and leaving with C. A. Burkhart, secretary of state of the State of Dakota, at his office in the capitol building in the city of Pierre, Hughes County, South Dakota, on the said 26th day of March, 1919, two copies thereof in exact duplicate, as certified by the clerk of the Supreme Court of the State of South Dakota, under his seal to be a true, correct, and complete copy of the original of said judgment; and that I know the said C. A. Burkhart to be secretary of state of the State of South Dakota, and as such to be the resident agent of the said defendant Nebraska Telephone Company, a foreign corporation, upon whom

service of process directed to the said defendant may be made in this State.

Dated this 26th day of March, 1919.

H. N. WALKER,
Deputy Sheriff.

66 *Certificate of service of judgment.*

F-652.

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA EX REL., BYRON S. PAYNE AS Attorney General and John J. Murphy and P. W. Dougherty as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, North Western Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

STATE OF SOUTH DAKOTA, *County of Hughes, ss:*

I, Henry Walker, deputy sheriff of Hughes County, South Dakota, do hereby certify and return that the annexed judgment of the Supreme Court in the above-entitled action dated March 24, 1919, came into my hands for service upon the 26th day of March, 1919; and that I served the same upon the defendant North Western Telephone Exchange Company by delivering to and leaving with C. A. Burkhart, secretary of state of the State of South Dakota, at his office in the capitol building in the city of Pierre, Hughes County, South Dakota, on the said 26th day of March, 1919, two copies thereof in exact duplicate, as certified by the clerk of the Supreme Court of the State of South Dakota, under his seal to be a true, correct, and complete copy of the original of said judgment; and that I know the said C. A. Burkhart to be secretary of state of the State of South Dakota, and as such to be the resident agent of the said defendant North Western Telephone Exchange Company, a foreign corporation, upon whom service of process directed to the said defendant may be made in this State.

Dated this 26th day of March, 1919.

H. N. WALKER,
Deputy Sheriff.

67 *Certificate of service of judgment.*

F—652.

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL., BYRON S. PAYNE, AS attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION; North Western Telephone Exchange Company, a corporation; Nebraska Telephone Company, a corporation; and South Dakota State Telephone Company, a corporation, defendants.

STATE OF SOUTH DAKOTA,
County of Brown, ss:

I, H. L. Elliott, sheriff of the county of Brown, State of South Dakota, do hereby certify and return that the annexed and foregoing judgment made by the Supreme Court of the State of South Dakota in the above entitled action on the 24th day of March, 1919, came into my hands for service on the 27 day of March, 1919, and that I served the same upon the defendant, Dakota Central Telephone Company, by delivering to and leaving with W. G. Bickelhaupt personally at Aberdeen, in the county of Brown, South Dakota, on the said — day of March, 1919, a copy thereof, certified by the clerk of the Supreme Court of the State of South Dakota, under his seal to be a true, correct, and complete copy of the original of said judgment; and that I know the said W. G. Bickelhaupt to be sec. & treasurer of the said defendant company.

Dated this 27 day of March, 1919.

H. L. ELLIOTT,
Sheriff.

By J. C. WOOD,
Deputy Sheriff.

68 *Certificate of service of judgment.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL, BYRON S. PAYNE, AS attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION; North Western Telephone Exchange Company, a corporation; Nebraska Telephone Company, a corporation; and South Dakota State Telephone Company, a corporation, defendants.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

I, Herman Wangsness, sheriff of the county of Minnehaha, State of South Dakota, do hereby certify and return that the annexed and foregoing judgment made by the Supreme Court of the State of South Dakota in the above-entitled action on the 24th day of March, 1919, came into my hands for service on the 27th day of March, 1919, and that I served the same upon the defendant, South Dakota State Telephone Company, by delivering to and leaving with M. L. Lane personally at Sioux Falls, in the county of Minnehaha, South Dakota, on the said 27th day of March, 1919, a copy thereof, certified by the clerk of the Supreme Court of the State of South Dakota under his seal to be a true, correct, and complete copy of the original of said judgment; and that I know the said M. L. Lane to be president of the said defendant, South Dakota State Telephone Company.

Dated this 27th day of March, 1919.

HERMAN WANGSNESS,
Sheriff.

By JULIUS WOLD,
Deputy Sheriff.

Judgment.

69 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL., BYRON S. PAYNE, AS attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiff,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION; North Western Telephone Exchange Company, a corporation; Nebraska Telephone Company, a corporation; and South Dakota State Telephone Company, a corporation, defendants.

This cause came on regularly for trial before the court on the 11th day of February, 1919, upon the complaint of the plaintiff, the answer of the defendants, and the reply of the plaintiff to the defendant's answer; the plaintiff appeared by Byron S. Payne, attorney general; Oliver E. Sweet, assistant attorney general; and P. W. Dougherty, its attorneys, and the defendants appeared by Thomas H. Null and Edgar M. Morsman, jr., their attorneys, and by Robert P. Stewart, United States district attorney; the cause was submitted for final determination upon the pleadings; the court heard the arguments of counsel; and the court having fully considered the same and being fully advised in the premises and having on this date made and filed its opinion, setting forth its conclusion that the permanent injunction prayed for by the plaintiff should be granted; now, therefore, on motion of Byron S. Payne, Oliver E. Sweet, and P. W. Dougherty, attorneys for the plaintiff,

It is hereby ordered, adjudged, and decreed that the Dakota Central Telephone Company, a corporation; the Northwestern Telephone Exchange Company, a corporation; the Nebraska Telephone Company, a corporation; and the South Dakota State Telephone Company, a corporation, the above-named defendants, and each of them, the officers, agents, employees, servants, attorneys, and representatives of the said defendants and of each of them, and all persons acting for, or on behalf of, or aiding or assisting them, or either of them, be, and they are and each of them is, hereby permanently enjoined

70 and restrained from charging, demanding, collecting or receiving and from making effective in any manner for the transmission of long distance or toll telephone messages between any points or stations on the lines of the said defendant telephone companies, or either of them, wholly within the State of South Dakota, any of the rates, fares, charges, rules, regulations, or classifications described in the complaint, and which the defendant telephone companies proposed to put into effect in this State on January 21, 1919, and which are more particularly described and specified in General

Order No. 2495, issued by Albert S. Burleson, Postmaster General of the United States, on December 13, 1918, otherwise known as Telegraph and Telephone Service Bulletin No. 22; and,

It is further ordered, adjudged, and decreed that the said Dakota Central Telephone Company, a corporation; Northwestern Telephone Exchange Company, a corporation; Nebraska Telephone Company, a corporation; and South Dakota State Telephone Company, a corporation, the above-named defendants and each of them, the officers, agents, employees, servants, attorneys, and representatives of the said defendant telephone companies or either of them, and all persons acting for and on behalf of, or in any wise aiding or assisting them, or either of them, be, and they are, and each of them is, hereby permanently enjoined and restrained from charging, demanding, collecting, or receiving and from making effective in any wise for the transmission of long distance or toll telephone messages over lines of the said defendant telephone companies, or either of them, between points or stations wholly within the State of South Dakota, any rates, fares, charges, or any rules, regulations or classifications of the long distance or toll telephone service, or any compensation whatever for such long distance or toll telephone service wholly within the State of South Dakota, higher than or in excess of the rates, fares, rules, regulations, classifications, and compensation now in effect or that may hereafter be regularly adopted and established by the said defendant telephone companies, or any of them, with the approval and consent of the Board of Railroad Commissioners of the State of South Dakota, pursuant to the statutes of said State in such case made and provided; provided, however, that this judgment shall not operate to enjoin or restrain the said defendant telephone companies, or
71 either of them, from charging and collecting, or from otherwise making effective such rates, fares, or compensation or such rules, regulations, or classifications as are now or hereafter may be established by the said defendants or by the Government of the United States for the transmission of Government communications by the use of long distance or toll telephone equipment between points within the State of South Dakota.

Dated at the city of Pierre, the capital, in Hughes County, South Dakota, this 24th day of March, 1919.

By order of the Court:

[SEAL.]

E. G. SMITH,
Presiding Judge.

Attest:

E. F. SWARTZ,
Clerk of the Supreme Court.

(Indorsed:) 4526. (5) State of South Dakota ex rel., Payne, Atty. Gen. et al, *vs.* Dakota Central Telephone Co. et al. Judgment. Supreme Court, State of South Dakota. Filed March 24, 1919. E. F. Swartz, *Clerk.*

72 *Petition for writ of error to the Supreme Court of South Dakota.*

In the Supreme Court of South Dakota.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, plaintiffs in error,

vs.

STATE OF SOUTH DAKOTA, EX REL., BYRON S. PAYNE, AS Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, defendant in error.

To the honorable, the Chief Justice of the Supreme Court of the State of South Dakota:

The petition of the Dakota Central Telephone Company, a corporation, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, respectfully shows:

1. Your petitioners, who are the plaintiffs in error herein and were defendants in the court below, are now and at all the times hereinafter mentioned, were severally telephone companies duly authorized to conduct local and long distance telephone operations in the State of South Dakota, being corporations as stated in the pleading in said case.

2. The defendant in error herein, the State of South Dakota, was plaintiff in the court below, and heretofore and on or about the 21st day of January, 1919, filed a suit in the Supreme Court of South Dakota, having original jurisdiction thereof under the laws of said State, on the relation of Byron S. Payne as Attorney General of said State, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners, for an injunction to

73 enjoin your petitioners from putting into effect the toll rates prescribed by an order of the Postmaster General, Albert S. Burleson, being his order No. 2495 (Bulletin No. 22) so far as the same affected intrastate long distance or toll telephone messages. The case was submitted for final determination by said Supreme Court of South Dakota upon the pleadings.

3. Said suit involves a contest between the State of South Dakota and your petitioners, acting for and under the President of the United States in his administration through Albert S. Burleson, Postmaster General, of the telephone systems of petitioners in the possession, supervision, control, and operation by the President under

the joint resolution of Congress of July 16, 1918, and under the proclamation of July 22, 1918, of the President of the United States, assuming the possession, supervision, control, and operation of each and every telephone system in the United States and every part thereof including those of petitioners, and directing that the same be taken and exercised by said Postmaster General. Pursuant to that direction said Postmaster General entered upon the discharge of his duties thereunder on August 1, 1918.

4. The complaint alleges that the only lawful intrastate telephone toll rates are those which were duly on file with said board prior to August 1, 1918; that under the laws of South Dakota and the lawful rules and regulations of said board, such intrastate rates can be increased only upon application to and approval of said board, and that the classifications, rules, regulations, and practices pertaining to said rates can be changed only in the same manner; that the laws of the State and lawful orders of the said board are not suspended as to such systems under Federal control during the period of Federal control, but remain in full force and effect; and that the petitioners will, unless restrained by the court, establish and put into effect as of January 21, 1919, new schedules or tariffs of rates, rules, regulations, and classifications as set forth in the Postmaster General's said order, in reliance upon the authority of the said joint resolution of Congress, proclamation of the President, and order of the Postmaster General, which will greatly increase the existing rates for toll messages and for services in connection therewith
74 wholly between points within the State of South Dakota without notice or application to said board or its approval and contrary to the laws of the State.

5. With respect to this claim of authority so asserted by petitioners, the complaint alleges that it is an invalid claim of authority for the reason a proviso of the joint resolution reserves to and leaves unimpaired in the States and in the State of South Dakota full jurisdiction and authority over intrastate rates, and therefore the threatened action of your petitioners would be in violation of law.

6. Your petitioners assert and allege that the authority and jurisdiction of complainants was superseded and suspended by the joint resolution of Congress and the action of the President and Postmaster General pursuant thereto, that the President through the Postmaster General has full power and authority to fix and regulate all telephone rates, including intrastate rates during the period of Federal control which has not expired, and that the State of South Dakota is wholly without authority or jurisdiction until Federal control is duly terminated by law; that your petitioners are merely the agents of the President and the Postmaster General and are agencies and instrumentalities of the United States; that they were ordered to put the new rates and schedules into effect and are and were without discretion in the matter; that the revenues to be derived therefrom and all operating revenues of said systems belong to the United States and your petitioners have no interest therein.

7. Petitioners set up in their answer that the suit is, in legal effect, one against the United States without its consent.

8. The matter was duly submitted to the supreme court of South Dakota, and that court on March 24, 1919, adjudged and decreed that the injunction issue against your petitioners as prayed, and that the suit is not against the United States, but is one against the several corporations to restrain the commission of an act not authorized under the laws of the United States and which would be in violation of the laws of the State, and decided against the authority in said
75 Postmaster General under said joint resolution of Congress and in favor of the validity of the statutes of the State of South Dakota.

9. That in and by said suit there was drawn in question the validity of a statute of, and an authority exercised under, the United States and said decision was against their validity; and there was drawn in question the validity of a statute of, and an authority exercised under, the State of South Dakota on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of their validity.

10. That the decision, judgment, and decree so rendered and filed by the supreme court of South Dakota were final in a suit in the highest court of the State of South Dakota and were unwarranted in law as plaintiffs in error are advised.

11. Petitioners present herewith an undertaking in due form as required by law, and an assignment of errors, and pray that a writ of error be allowed so as to have a review of said decision, judgment, and decree of the supreme court of South Dakota in the Supreme Court of the United Ctates, and that a citation issue in due form and course to require the defendant above named to appear to said writ of error and to show cause why the error should not be corrected as provided by law and the rules of this court.

DAKOTA CENTRAL TELEPHONE COMPANY,
NORTHWESTERN TELEPHONE EXCHANGE COMPANY,
NEBRASKA TELEPHONE COMPANY,
SOUTH DAKOTA STATE TELEPHONE COMPANY,
Petitioners,

By EDGAR M. MORSEMAN, Jr.,
Attorney for Petitioners.

Robert P. Stewart, United States District Attorney; Null and Royhl, E. A. Prendergast, Edgar M. Morseman, jr., attorneys for petitioners.

Writ of error allowed, as prayed, upon giving good and sufficient security as required by law for the sum of one thousand dollars ($1,000).

Dated this 5th day of April, 1919.

ELLISON G. SMITH,
Presiding Judge of the Supreme Court of the State of South Dakota.

(Indorsed:) 4526. (1) Dakota Central Telephone Co., et al., plaintiffs in error, vs. State ex rel. Payne, Atty. Gen., &c. et al., defendants in error. Petition for writ of error to Supreme Court. Order alowing writ. Supreme Court, State of South Dakota. Filed Apr. 5, 1919. E. F. Swartz, clerk.

76 *Assignment of errors.*

In the Supreme Court of the United States.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, Plaintiffs in Error.

vs.

STATE OF SOUTH DAKOTA, EX REL., BYRON S. PAYNE, as Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, Defendants in Error.

Come now, the plaintiffs in error, Dakota Central Telephone Company, a corporation, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, and aver that the decision, judgment, and decree rendered by the Supreme Court of South Dakota herein on March 24, 1919, is erroneous and against the rights of plaintiffs in error; and at the time of presenting their petition for a writ of error to review the same file therewith this their assignment of errors:

1. That the Supreme Court of South Dakota erred in holding that the suit is not one against the United States without its consent.

2. That said court erred in holding that "the action is not one against the United States or its property, but is one seeking to restrain the commission of an unauthorized act."

77 3. The Supreme Court of South Dakota erred in holding that "the determination of this case depends entirely upon the meaning of the second proviso in the joint resolution of July 16, 1918."

4. The Supreme Court of South Dakota erred in holding that the term "lawful police regulations" in the second proviso of the said joint resolution of July 16, 1918, is used therein in the broad sense which includes the power of rate making.

5. The Supreme Court of South Dakota erred in holding that, under and by virtue of the joint resolution of Congress of July 16, 1918, the power to fix intrastate rates and charges of telephone sys-

tems of which the President had assumed the possession, supervision, control, and operation, was not vested in the President, or his representative, Albert S. Burleson, Postmaster General.

6. Because said court erred in holding that the action of the Board of Railroad Commissioners of South Dakota in attempting to control or interfere with the rates prescribed by the Postmaster General acting under the authority of the President is the exercise of the police power of the State of South Dakota.

7. Because said court erred in holding that the police regulations of the State of South Dakota extend to or affect schedules of toll rates for telephone service promulgated by the Postmaster General as alleged in this case, and in not holding that said regulations are not authorized by said proviso to said resolution of July 16, 1918.

8. Because said court erred in not holding that the police power of the State of South Dakota and police regulations
78 affecting telephone rates can only apply to and affect such rates when made or charged by a private individual or corporation conducting a telephone business for the public service, and that such police power or regulations do not extend to or include the regulation of tolls made or charged by the Government of the United States or its officers acting under its authority.

9. The Supreme Court of South Dakota having held that the statutes of South Dakota pertaining to the regulation and control of telephone rates, and conferring upon the said Board of Railroad Commissioners jurisdiction over them, applied to rates made by the Postmaster General in the operation under the said joint resolution of July 16, 1918, of the telephone systems of plaintiffs in error while in the possession and control of, and being operated by, the Postmaster General pursuant to the President's proclamation of July 22, 1918, said Court erred in not holding that said statutes so construed were in conflict with said joint resolution and were superseded thereby as to said rates so made by said Postmaster General.

10. The Supreme Court of South Dakota erred in holding that the statutes of the State of South Dakota conferred upon the said Board of Railroad Commissioners any jurisdiction to regulate or fix intrastate telephone rates to be charged by the President while operating the telephone systems of the plaintiffs in error under the joint resolution of July 16, 1918, because said statutes so construed were in conflict with said resolution.

11. The Supreme Court of South Dakota erred in holding
79 that the Postmaster General's toll rate order No. 2495 was in violation of any "lawful police regulation" of the State of South Dakota within the meaning of that term in the said joint resolution of Congress of July 16, 1918, and enjoining the execution of said order No. 2495 upon that ground.

12. The Supreme Court of South Dakota erred in failing and refusing to decide and find that the South Dakota State Railway

Commission has been granted by the legislature no control over telephone systems operated by the Federal Government.

13. The Supreme Court of South Dakota erred in granting the injunction.

14. The Supreme Court of South Dakota erred in granting the injunction with the proviso "that it in no way affects the transmission of governmental communications or the issue of stocks and bonds by the defendants or either of them, and is therefore within the interdiction of the exception to the proviso of the said joint resolution."

15. The Supreme Court of South Dakota erred in failing and refusing to adjudge and decree, as prayed by plaintiffs in error, that the defendants, their officers, agents and servants are during the period of Federal control, the officers, agents and servants of the United States, and as such are subject only to the Orders, Direction and Control of the Postmaster General and of the President of the United States.

16. The Supreme Court of South Dakota erred in failing and refusing to adjudge and decree, as prayed by plaintiffs in
80 error, that the acts of the Postmaster General in promulgating said classifications and schedules of rates are the lawful exercise of authority conferred upon him by the laws of the United States and the proclamation of the President, and that it is the duty of the defendants as officers, agents and servants of the United States to apply and enforce such classification and rates during the period of Federal control.

WHEREFORE, plaintiffs in error pray that said errors be corrected, and that said decision, judgment and decree be reversed, and said bill of complaint be dismissed with costs.

Dated this fifth day of April, 1919.

DAKOTA CENTRAL TELEPHONE COMPANY,
NORTHWESTERN TELEPHONE EXCHANGE COMPANY,
NEBRASKA TELEPHONE COMPANY,
SOUTH DAKOTA STATE TELEPHONE COMPANY,
Plaintiffs in Error.

By EDGAR M. MORSEMAN, Jr.,
Attorney for Plaintiffs in Error.

Robert P. Stewart, United States district attorney; Null and Royhl, E. A. Prendergast, Edgar M. Morsman, jr., attorneys for plaintiffs in error.

(Indorsed:) 4526. (2) Dakota Central Tel. Co. et al., Plaintiff in Error, vs. State ex rel., Payne, Atty. Gen., et al., Defendants in Error. Assignment of Errors. Supreme Court, State of South Dakota. Filed Apr. 5, 1919. E. F. Swartz, Clerk.

81 In the Supreme Court of the United States.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, plaintiffs in error,

vs.

STATE OF SOUTH DAKOTA EX REL., BYRON S. PAYNE, AS Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, defendant in error.

Whereas on the 24th day of March, 1919, the Supreme Court of South Dakota made and entered its final judgment and decree in favor of the State of South Dakota, the above-named defendant in error, and against the Dakota Central Telephone Company, Northwestern Telephone Exchange Company, Nebraska Telephone Company, and the South Dakota State Telephone Company, the above-named plaintiffs in error, wherein it adjudged and decreed that said plaintiffs in error and each of them be permanently enjoined from promulgating, charging, and collecting in the State of South Dakota, the schedules, classifications, and rates for intrastate telephone messages set forth and provided in the order of the Postmaster General, Albert S. Burleson, referred to and set forth in the complaint of the State of South Dakota in said action; and

Whereas the above-named Dakota Central Telephone Company, Northwestern Telephone Exchange Company, Nebraska Telephone Company and the South Dakota State Telephone Com-
82 pany, plaintiffs in error, seek to prosecute a writ of error in the Supreme Court of the United States to reverse the said judgment and decree of the Supreme Court of South Dakota:

Now, therefore, the undersigned, American Surety Company, a corporation of the State of New York, does hereby undertake that the said plaintiffs in error shall prosecute their writ of error to effect, and if they fail to make good their plea, to answer all damages and costs that may be adjudged against them and each of them, not exceeding the sum of one thousand dollars ($1,000).

In witness whereof, the said American Surety Company has caused this undertaking to be executed and its seal attached this first day of April, 1919.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK.

By MARSHALL L. BROWER,

Resident Vice President.

Attest:

W. J. SPALCKHAVER,

Resident Assistant Secretary.

Approved this 5th day of April, 1919, by:

E. G. SMITH,
Presiding Judge of the Supreme Court of South Dakota.

82½ STATE OF NEW YORK, *County of New York, ss:*

On this 1st day of April, 1919, before me personally appeared Marshall L. Brower, resident vice president of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say that he resides in the city of New York, N. Y.; that he is the resident vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporat seal; that it was so affixed by order of the board of trustees of said corporation; and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with W. J. Spalckhaver and knows him to be one of the resident assistant secretaries of said corporation; that the signature of said W. J. Spalckhaver subscribed to the said instrument, is in the genuine handwriting of the said W. J. Spalckhaver and was thereto subscribed by the like order of the said board of trustees, and in the presence of him the said

MARSHALL L. BROWER,
Resident Vice President.

[SEAL.] H. M. HESS,
Notary Public, Bronx County No. 57.

Bronx Co. Register's No. 255. Certificate filed in N. Y. County No. 332. New York Co. Register's No. 10606. Certificate filed in Kings Co. No. 43. Kings County Register's No. 242. Certificates filed in Queens, Richmond, and Westchester Counties. Commission expires March 30, 1920.

83 AUTHORITY OF SIGNERS FOR SURETY.

Extract from the record book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual stockholders' meeting, was held at the office of the company, No. 100 Broadway, New York City, on Tuesday, January 21, 1919, at twelve o'clock noon.

"The secretary read the report of the nominating committee as follows:

"To the BOARD OF TRUSTEES,
American Surety Company of New York.

"GENTLEMEN: The committee appointed by the executive committee of this company, at their meeting held Tuesday, December 3, 191

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for the purpose of nominating * * * officers of the company * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * * place, New York, N. Y.; resident vice presidents, Marshall L. Brower, A. E. Cotterell, William M. Tomlins, jr., Lester S. Moore, W. H. E. Reinecke, E. D. Sadler, C. S. Waterbury, Louis Papen, Samuel B. Brewster, C. E. St. John; resident assistant secretaries, Marshall L. Brower, A. E. Cotterell, Charles S. Waterbury, Daniel Stewart, E. D. Sadler, W. H. E. Reinecke, E. J. Sabater, Louis Papen, Robert L. Neptune, M. E. McGuire, Geo. W. Acritelli, Charles A. Stumpf, Lester S. Moore, Clark Reynolds, F. G. Merrill, Samuel B. Brewster, C. E. St. John, Willis E. McCurdy, William J. Spalkhaver, Wm. C. Sievers, R. P. Luckett, Peter H. May. * * *

"Whereupon, it was

"*Resolved*, That the secretary be authorized to cast one ballot on behalf of the trustees present for the members of the executive committee, finance committee, committee on accounts, committee on capital box, officers and counsel, as recommended by the nominating committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"*Resolved*, That the resident vice presidents be, and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the company to any and all obligations for or on behalf of the company, such obligations, however, to be attested in every instance by a resident assistant secretary." * * *

STATE OF NEW YORK,
County of New York, ss:

I, H. E. Ising, assistant secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts from the record book of the Board of Trustees of the American Surety Company of New York, with the original record of said board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said record book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the company, at the city of New York, this 21st day of January, 1919.

[SEAL.]

H. E. ISING,
Assistant Secretary.

CLOSE IN CENTER

84 (Indorsed:) 4526. (3) Dakota Central Tel. Co. et al, Pltfs. in Error, vs. State, ex rel., Payne, Atty. Gen., &c., et al., Defts. in Error. Bond. On appeal to U. S. Supreme Court and order allowing bond. Supreme Court State of South Dakota. Filed April 5, 1919. E. F. Swartz, clerk.

85 UNITED STATES OF AMERICA, *ss:*

To State of South Dakota, ex rel., Byron S. Payne, as Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota:

Greeting: You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Supreme Court of the United States wherein Dakota Central Telephone Company, a corporation, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Ellison G. Smith, Presiding Judge of the Supreme Court of South Dakota, this fifth day of April, in the year of our Lord one thousand nine hundred and nineteen.

ELLISON G. SMITH,
Presiding Judge of the Supreme Court of South Dakota.

85½ (Indorsed:) 4526. (4) Citation. Due and legal service of the within citation at the City of Pierre, South Dakota, is hereby admitted this 5th day of April, 1919. Byron S. Payne, Attorney General, State of South Dakota. Peter Norbeck, Governor of the State of South Dakota. Supreme Court, State of South Dakota. Filed Apr. 5, 1919. E. F. Swartz, Clerk.

86 *Stipulation.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL., BYRON S. PAYNE, AS Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiffs,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

It is hereby stipulated by and between counsel for Plaintiffs and counsel for Defendants, that the Clerk of the Supreme Court of the State of South Dakota shall include in the transcript to be sent the Clerk of the Supreme Court of the United States the following: Summons and return showing service; Plaintiffs' Complaint; Affidavit of John J. Murphy and motion; order to show cause; defendants' answer; plaintiffs' reply; journal entry of submission of cause; opinion of the Supreme Court of the State of South Dakota; judgment of the Supreme Court of the State of South Dakota;

That on filing this stipulation the Clerk may forthwith make and certify said transcript.

Dated April 5th, 1919.

BYRON S. PAYNE,
OLIVER E. SWEET,
P. W. DOUGHERTY,
Attorney for Plaintiff.

EDGAR M. MORSEMAN, JR.,
Attorney for Defendants.

87 (Indorsed:) 4526. (5) State, ex rel., Payne, Atty. Gen., et al., vs. Dakota Central Telephone Co., et al. Stipulation in re Transcript of Record. Supreme Court, State of South Dakota. Filed Apr. 5, 1919. E. F. Swartz, Clerk.

88 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Supreme Court of the State of South Dakota.

Greeting: Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of South Dakota before you, or some of you, being the highest court of law or equity of the said State in which a decision

could be had in the said suit between Dakota Central Telephone Company, a corporation; Northwestern Telephone Exchange Company, a corporation; Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, plaintiffs in error, vs. State of South Dakota, ex rel. Byron S. Payne, as attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being re-
89 pugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Dakota Central Telephone Company, a corporation; Northwestern Telephone Exchange Company, a corporation; Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of April, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] JERRY CARLETON,
Clerk of the District Court of the United States for the District of South Dakota.

Allowed by:

ELLISON G. SMITH,
Presiding Judge of the Supreme Court of South Dakota.

(Indorsed:) 4526. (6) Supreme Court of the United States. October term, 191—. Dakota Central Telephone Company et al., plaintiffs in error, vs. State of South Dakota, ex rel., defendant in error. Writ of error. Supreme Court State of South Dakota. Filed Apr. 7, 1919. E. F. Swartz, clerk.

90 *Clerk's certificate.*

In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS attorney general, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota, plaintiffs,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, defendants.

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, E. F. Swartz, clerk of the Supreme Court of the State of South Dakota, hereby certify the foregoing transcript, consisting of 89 pages, constitutes a full, true, and correct copy of the proceedings had and orders entered in the above-entitled cause, as set forth therein, as the same appears on file and of record in this office, with the exception of petition for writ of error and order allowing same, bond and order allowing bond, the writ of error, the citation, and assignment of errors and stipulation in re transcript of record herewith attached, at pages 72 et seq., respectively, which are the original petition for writ of error and order allowing same, bond and order allowing bond, writ, assignment, and citation and stipulation in re transcript of record.

The foregoing constitutes the entire transcript in the cause.

Witness my hand and the official seal of said court, this 7th day of April, A. D. 1919.

[SEAL.]

E. F. SWARTZ,
Clerk of the Supreme Court of the State of South Dakota.

(Indorsed:) File No. 27053. South Dakota Supreme Court. Term No. 967. Dakota Central Telephone Company et al., plaintiffs in error, vs. The State of South Dakota, ex rel. Byron S. Payne, attorney general, et al. Filed April 10th, 1919. File No. 27053.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

DAKOTA CENTRAL TELEPHONE COMPANY, a corporation, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, Plaintiffs in error,

v.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. Payne, as Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota.

No. 967.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

MOTION ON BEHALF OF THE UNITED STATES AND PLAINTIFFS IN ERROR TO ADVANCE.

Comes now the Solicitor General on behalf of the United States, and, because of the interest of the United States in said cause and with the concurrence of counsel for plaintiffs in error, who join in this

motion, moves the advancement of the above-entitled cause for hearing during the present term.

While the Postmaster General is not a formal party to the record, the question is made that he is an indispensable party, that the plaintiffs in error are really his agents, that the suit is one in effect against the United States, and that the United States is the party really affected by the decision.

The case presents the question whether the schedule of telephone rates, effective January 21, 1919, promulgated by the Postmaster General under the authority of the joint resolution of Congress of July 16, 1918, and the President's proclamation thereunder dated July 22, 1918, is legally applicable to intrastate service within the State of South Dakota. Defendants in error contended in their original bill filed in the Supreme Court of South Dakota that such rates were not lawful without the approval of the State Board of Railroad Commissioners, and that no such approval had been given. That court has granted a permanent injunction restraining the putting of said rates into effect, and the Postmaster General is being deprived of the revenues sought to be raised thereby, which are needed in operating said telephone lines. If such revenues are not collected as due, it is practically impossible to collect a large percentage afterwards.

The question presented in this case has arisen in suits filed in a number of other States, with the result that in Florida, Indiana, Illinois, Minnesota, Missouri, Nebraska, Ohio, Pennsylvania, and Michi-

gan the decision has been against the power claimed by the Postmaster General, while in the Federal courts of Florida, Indiana, New Jersey, and North Dakota, and in the State courts in Alabama, Louisiana, Massachusetts, and Oklahoma decisions have been rendered in his favor. Injunction proceedings are pending in Georgia, California, New York, Texas, Nebraska, Indiana, Wisconsin, North Dakota, and Mississippi.

Movant shows that this situation not only is producing financial loss, but is greatly embarrassing the administration of said telephone lines by the Postmaster General, and its speedy hearing is of great public moment.

Notice of this motion has been given to counsel for the defendants in error, who do not oppose the same.

ALEX. C. KING,
Solicitor General.

APRIL, 1919.

○

Office Supreme Court, U. S.
FILED
MAY 5 1919
JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 967.

DAKOTA CENTRAL TELEPHONE COMPANY, ET AL.,
Plaintiffs in Error,

vs.

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, Attorney General, ET AL.,
Defendant in Error.

Brief of Protective Telephone Association of Baltimore City, Maryland, et al. as Amici Curiae.

H. FINDLAY FRENCH,
OGLE MARBURY,
Solicitors and Counsel.

KING BROS., Printers & Publishers, 906 N. Calvert St., Balto., Md.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 967.

DAKOTA CENTRAL TELEPHONE COMPANY, ET AL.,
Plaintiffs in Error,

vs.

STATE OF SOUTH DAKOTA, EX REL BYRON S. PAYNE, Attorney General, ET AL.,
Defendant in Error.

Brief of Protective Telephone Association of Baltimore City, Maryland, et al. as Amici Curiae.

The Protective Telephone Association of Baltimore City, Maryland, and Alfred R. L. Dohme and Herbert Sheridan, its President and Secretary, after leave first had and obtained, file herein this brief as *amici curiae* in support of the defendant in error.

THE PROTECTIVE TELEPHONE ASSOCIATION.

The Protective Telephone Association of Baltimore City, Maryland, is a voluntary association, composed of seven hundred or more users of and subscribers to the telephone service

which is furnished by the Chesapeake and Potomac Telephone Company of Baltimore City. With the support of the business community, the Association was formed in 1912 for the purpose of obtaining reasonable telephone rates and service for Baltimore. At its instance, an investigation was commenced by the Public Service Commission of Maryland for the purpose of revising the existing telephone rates. In this investigation, all the property of the Telephone Company in the State of Maryland was valued for rate making purposes, and at the time of the breaking out of the war, there remained, only the segregation of Baltimore from the rest of the State, and the final fixing of rates upon the basis of the valuation already found by the Commission. After the war commenced both the Telephone Company and this Association asked that further action in the investigation be postponed, and the Public Service Commission of Maryland on December 6, 1917, passed the following order (No. 3986) postponing, on account of war conditions, any general readjustment of telephone rates in Maryland:

BEFORE THE

PUBLIC SERVICE COMMISSION OF MARYLAND.

CASE NO. 690.

IN THE MATTER OF

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF BALTIMORE CITY, INVESTIGATION OF RATES, CHARGES, PROPERTY AND AFFAIRS.

The application of the respondent company for a postponement of proposed hearings in the above matter for the purpose of ascertaining what, if any, readjustment of its rates,

charges and practices should be made, having been duly received, and this Commission, by its order No. 3949 of November 20, 1917, having directed that such application be set for public hearing on December 5, 1917, and that copies of said Order be sent to all the newspapers published in the State of Maryland with the request of the Commission that proper publicity be given of the objects and date of such hearing; and it appearing that copies of said order together with copies of the application of the respondent for such postponement and of the report of People's Counsel thereon, were in fact sent to all the newspapers published in the State with the request aforesaid, as well as to the proper officers and representatives of the Protective Telephone Association of Baltimore City; and it further appearing that much publicity was given to such order through the public press;

And Whereas, At the public hearing held on December 5th, 1917, pursuant to said Order No. 3949, representatives of the respondent company and of said Protective Telephone Association of Baltimore City and certain civic associations were present, together with other individual members of the general public, and were duly heard;

And Whereas, It was shown conclusively at such hearing both by evidence adduced by the respondent company and by the concurrence of those present at such hearing that owing to the World War now in progress and to abnormal conditions resulting therefrom, the present is not a propitious or suitable time for this Commission to determine what, if any, general readjustment of the rates, charges and practices of the respondent company in the State of Maryland should be made;

It Is Thereupon, This 6th day of December, 1917, by the Public Service Commission of Maryland,

Ordered, That hearings upon any proposed general readjustment of the rates, charges and practices of the Chesapeake and Potomac Telephone Company of Baltimore City, be postponed until such time as in the judgment of this Commission business conditions affecting said Company and the people of the State of Maryland are so stabilized or adjusted as to justify the further prosecution of such inquiry, or, in the alternative, until it shall be made to appear that the public convenience and necessity for such general readjustment reasonably demand the further prosecution of such inquiry despite the unsettled conditions resulting from the World War now in progress, and until the further order of this Commission in the premises so deciding; provided, however, that nothing contained in this order shall be taken as in any way precluding this Commission from inquiring into and passing upon specific complaints, made heretofore or hereafter from time to time of its own motion or by the respondent company or members of the general public, of individual or particular rates, charges or practices, on the ground that they are discriminatory or otherwise unreasonable or unjust, so long as such specific complaints do not involve an inquiry into the general readjustment of the rates, charges and practices of the respondent company, and may properly and reasonably be passed upon under conditions existing at the time such complaint or complaints may come to be heard;

And It Is Further Ordered, That copies of this order be transmitted by the Secretary to the respondent company and to the proper representatives of the Protective Telephone Association of Baltimore City, and that due publicity be given the same.

Government Disregards Public Service Commission's Order.

The Chesapeake and Potomac Telephone Company, acting under the alleged authority of the Postmaster General of the United States, delegated to him by the President under virtue of the resolution of Congress of July 16, 1918, has from time to time disregarded the above mentioned order of the Public Service Commission of Maryland.

As instances of such disregard, the company promulgated new rates for telephone installations and removals effective September 1, 1918 (P. M. G. Order No. 1931), and, on January 21, 1919, revised intrastate toll charges (P. M. G. Order No. 2495). On account of the relative unimportance of these changes to the members of the Protective Telephone Association, it was considered unnecessary to contest their legality. When, however, on April 15, 1919, the Chesapeake and Potomac Telephone Company published advertisements in all the daily papers of Baltimore stating that an entirely new local rate schedule would be put into effect on May 1, 1919, it became evident that the question of the legality of rate changes made without the authority of the Public Service Commission of Maryland could no longer be avoided.

General Counsel Rules That Commission is Powerless.

On April 19, 1919, the Protective Telephone Association, through its President, offered to the Public Service Commission of Maryland, the services of the Association and its counsel in upholding the authority of the Commission over intrastate telephone rates. On April 22nd the General Counsel of the Commission advised the Commission that it was without jurisdiction in the matter, and that the Government had absolute power to fix rates, irrespective of any action

which might be taken by the Commission, *which rates would continue in full force and effect even after the termination of Federal control.*

As the opinion of the General Counsel that it had no jurisdiction, inevitably barred the Public Service Commission of Maryland from affirmative action, the duty devolved upon the Protective Telephone Association of protecting the proper interests of telephone subscribers in Baltimore City. To secure such protection, it could have filed a bill for injunction against the proposed rates, of the same character as the bills for injunction which have been filed and granted in other states. On the other hand, it could postpone asking for such injunction in the reasonable expectation that it would be permitted to set forth arguments supporting its convictions in the instant case. This latter view seemed best, since final determination on any injunction proceeding holding up rates, must depend upon the decision of this Court in this case. For this reason the Association has determined that the interests of telephone subscribers in Maryland can best be protected through the filing of a brief in their behalf, and has therefore asked leave to present the following argument:

ARGUMENT.

Wire Control Resolution of July 16, 1918, was Expressly Limited.

The joint resolution of Congress adopted July 16, 1918, authorized and empowered the President during the continuance of the present war to take possession and assume control of any * * * telephone * * * system, and to operate the same in such manner as may be needful or desirable for the term of the war. *Unless the passage of this Act carried*

with it the right to control intrastate telephone rates, then such right is non-existent in the President.

At the close of this resolution of July 16, 1918, a distinct limitation is placed upon the control of the Government in the following words:

> "Provided further, That nothing in this Act shall be construed to amend, repeal, impair or affect existing laws or powers of the States in relation to taxation *or the lawful police regulations of the several States,* except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems." (The italics are ours.)

What Did Congress Mean by the Words "The Lawful Police Regulations of the Several States"?

The main question at issue hinges upon the meaning of the words "lawful police regulations of the several States" which were specifically exempted from Government interference, except in regard to the transmission of Government communications and the issue of stocks and bonds. Unless Congress by the use of the words "police regulations" clearly and unequivocally confined this exemption to *penal* regulations, it must have meant to exempt the general police power over rates which is inherently possessed by each State through the nature of its sovereignty, for the Government has no authority over intrastate rates.

This power has been recognized by this Court in many cases, one of the earliest describing it in these words:

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he

might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private (Thorpe vs. R. R. Co., 27 Vt. 143), but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Chief Justice Taney in the License Cases, 5 How. 583: 'Are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for service rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

Munn vs. People of Illinois, 94 U. S. 113.

The Police Regulations of the Several States are Nothing More or Less Than the Police Power of the Several States Translated Into Terms of Action.

To confine the meaning of the words "police regulations" to certain unimportant penal statutes is a narrow and technical distortion. The right of the State to regulate rates rests as this Court has said, upon its police *power* to protect the life, health, comfort and property of all persons within the State, and whenever this right is translated into action, this action necessarily takes the form of a police *regulation*. The State controls intrastate rates *under its police power by means of police regulations*. To assert that Congress intended to take away the police power of the states over intrastate rates, yet also specifically left all the State police regulations in full force and effect, is tantamount to an assertion that Congress intended to establish irrevocably all the then existing intrastate rates for the duration of the war. *For if the police power of the State were taken away, there would be no other power by which existing police regulations, under which the rate schedules had been established and were being continued, could be altered.*

This Court itself has spoken of state police regulations as including the actual fixing by the state of intrastate rates.

> "Without, therefore, relying at all upon any acceptance by the railroad corporation of the legislation of the State, passed in 1873, in respect to it, we are of the opinion that the Texas and Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of *taxation, rates and other police regulations.*" (The italics are ours.)
>
> Reagan vs. Mercantile Trust Co., 154 U. S. 413, 417.

A clear statement of the entire question is contained in a very recent decision of the New Jersey Board of Public Utility Commissioners when it said:

> "Lawful police regulations of the states are such regulations as the states may lawfully make in the exercise of their police power. The courts in numerous decisions have held that the regulation of rates is a lawful exercise of the police power. It is not pertinent, and, therefore, unnecessary, to discuss whether Congress, in providing for Federal operation of telephone companies, had power to declare state laws affecting these companies to be null and void. The fact is that Congress expressly declared that its act should not be construed to impair or repeal such laws in relation to lawful police regulations. Unless and until it is declared by a Court of competent jurisdiction that the suspension of increased charges for telephone service is not a lawful police regulation, the Board must assume the Postmaster General, as well as the telephone companies operated by him, are subject to provisions of the New Jersey statute with respect to charges for such service."
>
> *Re* Suspension of Increased Charges for Telephone Service, P. U. R. 1919, B. 587.

Light Thrown on Subject by Rail Control Act.

When Congress passed the Federal Rail Control Act of March 21st, 1918, it expressly provided (paragraph 10) that the President might initiate rates, fares, charges, etc.; the reasonableness of the same being left to the final determination of the Interstate Commerce Commission. When, however, the Government took over the telephone lines under authority of the resolution of July 16, 1918, Congress failed to place any regulatory body in charge of interstate telephone rates. *It is a matter of common knowledge that telephone*

rates relate chiefly to local and not interstate service, the reverse being true in regard to railway rates.

The Rail Control Act contained the same exemption of lawful police regulations of the states found in the Wire Control Resolution. This, we submit, meant to leave to State Commissions their former control of intrastate rates, and as to interstate rates gave to the President the initiative. But the President, as we have shown, could not fix the rates finally without the approval of the Interstate Commerce Commission.

Why should the Postmaster-General, the agent of the President, assume a power over wires which Congress carefully refrained from giving the President over rails?

Even under the assumption, which we consider erroneous, that Government rail control was extended over *intrastate rates*, we cannot bring ourselves to believe that Congress intended to and did afford to shippers a tribunal to which they could appeal for the adjustment of intrastate railroad rates, and later deprived telephone subscribers, whose chief interest lay in intrastate rates, not only of the opportunity of an appeal to their own Public Service Commissions, but even of any appeal at all. The language used gives no substantial reason for believing that Congress so intended. Not only is the *wording* of the exemption contained in the Act directly to the contrary, as we have shown, but the fundamental interpretation of the Act by any rule of reason would negative such a presumption.

If Doubt Exists, Decision Should Favor State Control.

If there exists doubt on the subject, such doubt should be resolved in favor of State control. All powers which have not been delegated to the Federal Government are reserved, under the Constitution, to the several States. The exercise

of State power over intrastate rates is based solely on its reserved powers under the Constitution. Such powers cannot be taken away by Congress except by the expression of a clear and direct intention.

> "The principle has been often reaffirmed that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive so that the two acts could not be reconciled or consistently stand together.'"
>
> Reid vs. Colorado, 187 U. S. 137, 148.

The most that can be said in favor of the Government's position still leaves the intention of Congress a question of doubt. In the event of such doubt, the rule of this Court leads to the conclusion that the reserved powers of the several States over intrastate rate matters have *not* been summarily taken away.

CONCLUSION.

Waiving discussion, for the purpose of brevity, of such related issues as the validity of the resolution itself, the delegation of the authority vested in the President, the cessation of hostilities six months ago, and subjects of a similar nature, we are content to rest the case wholly upon the construction of the Act of Congress of July 16, 1918. We contend that the fixing of intrastate rates is now and always has been a lawful exercise of police regulations based upon the powers reserved to the States under the constitution; that these powers cannot be taken away from the States even in time of war except by an Act of Congress clear, and unequivocal in meaning; and that the Act of July 16, 1918, not only does not take away State power to fix rates, but on the contrary expressly leaves it in full force and effect.

For these reasons we ask the Court to hold that the Government has no jurisdiction over intrastate telephone rates, and that such rates cannot be increased without submission to the Commissioners of the several States having authority in time of peace.

H. FINDLAY FRENCH,
OGLE MARBURY,
Solicitors and Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1918.

No. 967.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, NORTHWESTERN TELEPHONE EXCHANGE COMPANY, A CORPORTION, NEBRASKA TELEPHONE COMPANY, A CORPORATION, AND SOUTH DAKOTA STATE TELEPHONE COMPANY, A CORPORATION,PLAINTIFFS IN ERROR,

vs

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS ATTORNEY GENERAL, AND JOHN J. MURPHY AND P. W. DOUGHERTY, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF SOUTH DAKOTA

The State of Wisconsin, upon the relation of its Attorney General, has heretofore brought an action in the original jurisdiction of the supreme court of that state, for the purpose of restraining and enjoining the Wisconsin Telephone Company, a corporation of Wisconsin, and the agencies under its direction and

control, from charging rates for telephone messages in excess of those fixed by the provisions of its statutes and the order and determination of the Railroad Commission of Wisconsin. The supreme court of Wisconsin, on the 29th day of April, 1919, rendered a decision in said matter by a divided court, denying the application for injunction and dismissing the complaint, the ground of its decision being in substance that the police regulations referred to in the proviso of the joint resolution are "undoubtedly such regulations intended to insure the lives, health, moral and physical welfare and good order of the public and of the employees, as the state may see fit to prescribe." The court further holds that the suit was in effect a suit against the government, upon the authority of *Belknap v. Schild*, 161 U. S. 10; *International P. S. Co. v. Bruce*, 194 U. S. 601, and *Wells v. Roper*, 246 U. S. 535. Said decision was rendered too late to enable the state to bring the same to this court by writ of error in the regular course, in time to permit consolidation with the actions involving the determination of the same questions, now pending herein, and it is assumed that, if brought here for review in due course, additional briefs will not be desired. In lieu thereof, by virtue of said facts, and by reason of the interest of the State of Wisconsin and its citizens in the decision of these actions, the undersigned, representing the State of Wisconsin, with the consent of the Attorney General of South Dakota, do hereby pray leave of this court to file this, their brief, as *amici curiae*, in support of the power, authority, and duty of this court and the appropriate courts of the various states to grant

relief by injunction, restraining the various telephone companies acting under the direction of the Postmaster General from putting into effect rates in excess of those determined to be reasonable and lawful by the properly constituted tribunals of the various states.

It being assumed that the briefs already filed contain a statement of the case, the questions involved, and the manner in which they are raised and a specification of the errors relied upon, this argument will be confined to a discussion of the following points of law which it is believed are decisive of the present controversy.

STATEMENT OF THE POINTS OF LAW

I. The suits for injunction by the various states are not actions against the United States, and it is not a necessary party.

II. No question of war power involved, because imperative necessity in extreme case only justification for taking private property even by military officer without due process.

III. There is nothing in the language of the resolution or in the purpose to be served warranting the inference that Congress intended to interfere with state regulation of intrastate rates, but, on the contrary, it affirmatively appears that it did not intend such interference.

IV. Provisions giving Interstate Commerce Commission power to fix telephone rates not repealed; consequently it still retains power, and Postmaster

General does not possess it either as to interstate or intrastate rates.

V. The joint resolution and presidential proclamation cannot be construed as contended by the government and telephone companies, because such construction would render the resolution void, by reason of conflict with the fifth amendment and the tenth amendment of the federal constitution, and would violate the rule against the delegation of legislative power.

VI. Assuming that the President was given the rate making power by the act in question, it was not delegated by him to the Postmaster General.

VII. Rate making power, if granted by joint resolution, vested in President personally, and cannot be delegated.

VIII. Does attempt by President to delegate all, or as in this case, more than the discretion vested in him entirely invalidate proclamation, so as to confer no authority on Postmaster General at all?

IX. Practical construction of the law by the Postmaster General and the telephone companies, as illustrated by compensation agreement.

ARGUMENT

I

THE SUITS FOR INJUNCTION BY THE VARIOUS STATES ARE NOT ACTIONS AGAINST THE UNITED STATES, AND IT IS NOT A NECESSARY PARTY.

The conception that the United States is in any way interested in the present controversy and that the court can dispose of the issues without consideration or interpretation of the Joint Resolution of Congress and the Proclamation of the President pursuant thereto presents a curious inversion of logic which in effect begs the whole question. This, it seems to us, is what the learned court of Massachusetts has done.

We submit that if the postmaster general has the power to fix intrastate telephone rates, then his act is that of the United States; if he has no such power, then his attempt to fix such rates is a mere personal assumption of authority, which affords him no protection, and which affords no protection to those acting or pretending to act by his direction. The court cannot escape the determination of the extent of the authority of the postmaster general. That is a necessary preliminary to any decision.

Supposing that the postmaster general underwent a like misconception as to his powers in postal matters and sought to collect a ten cent postage where the law permitted only three cents. Would it then be contended that, if suit were brought in a state

court to restrain such extortion, the United States Government was being sued without its consent, or that we were attempting to interfere with the revenues of the United States? Obviously not. The seven cents of excessive postage would not be revenue, and the action of the postmaster general would not be the action of the United States, but merely his individual assumption of arbitrary power, whose exercise a court of equity would promptly restrain. There is no controversy between the state and federal government here, in any sense whatever. The sole question is that of proper construction of a federal law, with a view of determining whether Albert S. Burleson has issued legal instructions as postmaster general within the scope of properly delegated power, to the defendant companies or whether the order is his mere personal pronunciamento, obedience to which affords the defendants no protection.

That these actions are not suits against the United States and in no way involve the government of the United States unless they question or seek to challenge a valid exercise of authority under a valid law, has in our judgment been so conclusively and satisfactorily established by the brief of Mr. Hughes and his associate counsel, in the recently argued case of the *Commercial Cable Company v Albert S. Burleson and Newcomb Carlton*, that we shall only refer to the cases there cited, to-wit, *Little. v Barreme*, 2 Cranch. 170; *U. S. v. Lee*, 106 U. S. 196; *Lindal v. Wesley*, 167 U. S. 204, to which we would add these additional citations:

Wadsworth v. Boysen, 148 Fed. 771, at page 779.

Board of Liquidation v. McComb, 92 U. S. 531, at p. 541.
In re Ayres, 123 U. S. 443, at p. 504 and p. 506.
McGahey v. Virginia, 135 U. S. 662, at p. 684.
Poindexter v. Greenhow, 114 U. S. 270, at p. 288:

"The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it."

Hagood v. Southern, 117 U. S. 52, at p. 70.
Scott v. Donald, 165 U. S. 107, at p. 112.
Ex parte Young 209 U. S. 123 p. 159.

Their argument (p. 26) is equally decisive on the proposition of the power and the duty of the court to inquire as to the scope of the authority asserted.

Field v. Clark, 143 U. S. 649.
Buttfield v. Stranahan, 192 U. S. 470.
Union Bridge Co. v. U. S., 204 U. S. 364.
American School of Magnetic Healing v. McAnulty, 187 U. S. 94.
Interstate Commerce Commission v. L. & N. R. Co., 227 U. S. 88, 91.

And we cite these additional cases:

U. S. Railroad Administration v. Burch, 254 Fed. 140, passing upon the extent of the power of the director general of railroads under the cognate statute for the control of railroads, contains this language:

"All acts done and all property taken possession of within the adjudicated extent of the powers allowed might be a ministerial question: but as to

> the extent of those powers, and whether the powers were given, must always, under the Constitution of the United States, remain a judicial question, and one to be decided by the courts of the land."

State ex rel. Caldwell, 170 N. W. 570 (S. Dak.) (Advance Sheets, Februrary 21, 1919):

> Head Note 1: "The jurisdiction and power of civil courts may extend to ministerial acts which an executive officer of state, such as the President, or those acting under him, may assume to do by virtue of his office, but which may be found to have been in excess, beyond the scope, or a misuse of his authority."

Friesen v. Chicago, R. I. & P. Ry. Co., 254 Fed. 875. The court in construing the railroad administration act says of the powers of the President thereunder—

> "he may not take action contrary to the provisions of this act of Congress."

The cases relied upon by the supreme court of Massachusetts:

> *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599;
> *Louisiana v. Garfield*, 211 U. S. 70, 77, 29 Sup. Ct. 31, 53 L. Ed. 92;
> *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935;
> *Naganab v. Hitchcock*, 202 U. S. 473, 26 Sup. Ct. 667, 50 L. Ed. 1113;
> *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 606, 24 Sup. Ct. 820, 821 (48 L. Ed. 1134);

as demonstrated in the brief of Messrs. Cook and Hughes (pp. 35–5) are quite beside the point. The

present actions are brought, not to interfere with the possession or use of property by the United States, but are brought to prevent the infringement of individual right under the guise or pretext that authority to do so is conferred by federal statute, and the very question to be answered is: Does the statute confer such authority?

II

NO QUESTION OF WAR POWER INVOLVED, BECAUSE IMPERATIVE NECESSITY IN EXTREME CASE ONLY JUSTIFICATION FOR TAKING PRIVATE PROPERTY EVEN BY MILITARY OFFICER WITHOUT DUE PROCESS.

Neither is the issue to be confused by any misty conception of supposed war power on the part of the President. The war power and the peace power of the President, outside of the three kinds of military jurisdiction under the constitution set forth by Chief Justice Chase in Ex Parte Milligan, 4 Wall. 2, at pages 141–42, are one and the same thing. We have nothing to do here with the class of military rule covering the conduct of military forces in the government of occupied territory, nor are we dealing with that other class of military government concerned with the government of the Army and Navy proper. Congress, had it seen fit to do so, might no doubt have passed an enactment as it did during the Civil War (Vol. 12, U. S. Stats. at Large, p. 334, ch. 15, 37th Congress):

"to place under military control all the officers,

> agents, and employes belonging to the telegraph and railroad lines thus taken possession of by the President, so that they shall be considered as a post road and a part of the military establishment of the United States, subject to all the restrictions imposed by the rules and articles of war."

There is sufficient similarity to the Civil War act in the resolution under consideration to lead to the belief that Congress consciously rejected this alternative of making the telephone business a part of the military organization of the United States. This being true, both the first and second classes of military rule do not obtain. The only possible theory, there could be then, is that a species of stratified martial law must have been projected across and athwart the existing subdivisions of government, and have completely enveloped and controlled the conduct of this business.

This is an impossible conception, because, we submit, the government of no state and no portion thereof can be part martial and part civil. It must either be all one or all the other. As phrased *In re Kemp*, 16 Wis 359, 376:

> "When martial law exists, it must be supreme in order to be effectual. It cannot co-exist with the civil power; if it does, the latter must be in entire subordination to it."

The implication of the language in the pleadings leads to a definition quite as strong as that stated by the Duke of Wellington:

> "Martial law is neither more nor less than the will of the general who commands the army."

And as stated *In re Egan*, 5 Blatchford 319 (Federal Cases, No 4303), at p. 321:

> "The entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty and property of all in the palm of his hand."

U. S. v. Diekelman, 92 U. S. 520, at p 526:

> "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will."

Is it not a sufficient answer to this proposition, that the court, in common with every citizen of the nation, knows that martial law and nothing approximating it has either been declared or attempted to be declared?

In the absence of such declaration of martial law, the rule governing even the military department of government, from the commander-in-chief down through all of his subordinates, as to the violation of the individual right to life, liberty, and property, has repeatedly been declared. Chief Justice Dixon said: In Re Kemp supra 368.

> "The powers of the president as commander-in-chief of the army and navy in time of war, are strictly constitutional powers."

And Justice Cole phrased it, at p. 377:

> "Wherever war exists there martial law may be declared. But it must be confined to fields of strife and actual conflict, and cannot be extended to states not the theater of military operations."

As it appeals to us, this confusion has arisen—because the telephone and telegraph properties hav-

ing been taken under the war power of Congress and their operation entrusted to the President, he being the commander-in-chief of the army and navy, it has been assumed that in the exercise of the power delegated—the operation of the business—the military commander is discharging military functions. Sight has been lost, apparently, of the proposition that so far as this exercise of authority is concerned, both the President and postmaster general, and anyone acting under them or either of them, are acting solely and entirely as the agents of Congress. We insist most earnestly that, except as the President asserts his power through one of the three appropriate channels of military government in the strict sense, he has no other or different power in time of war than he has always had. We insist that Conress did not and could not confer any addition or enlargement to his power in that respect, because it in turn is bounded and limited and hedged about by the constitution. It can confer no power to violate the constitution, because it possesses none itself. It cannot delegate either to the President or the postmaster general, in their purely civil capacity, absolutely unrestricted authority to disregard constitutional restraints, because Congress itself does not possess that power. Neither can Congress enlarge his military powers, because within their sphere they are already absolute and supreme. Congress cannot, we insist, engraft a military power, a "war power," so-called, upon the discharge of a purely civil function, nor invest with military attributes a purely civil power.

When we find how jealously the courts have viewed the exercise of purely military functions them-

selves, where they transgressed civil rights, we should naturally expect this to be the rule. We find the supreme court of the United States, speaking through its Chief Justice, in *Mitchell v. Harmony*, 13 Howard 115. This case contains a discussion of the right of even a military officer to take private property of a citizen without due process of law.

The holding of this case was likewise discussed in detail in the brief in the Commercial Cable case (pp. 17, 18, 19, 20), and we shall not repeat the language because the court has recently had the reasoning thereof thus fully presented. Further support of this position, however, is found in *Raymond v. Thomas*, 91 U. S. 712, at p. 716:

> "It is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."

McLaughlin v. Green, 50 Miss. 453, at p. 467:

> "In flagrant war, power does not belong to a military officer, merely as such, to take or to destroy the property of the citizen, unless a necessity exists to apply it to military purposes, or to prevent its capture by the enemy."

United States v. Russell, 13 Wall. 623, 627–629:

> "Taking of private property by the government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such cir-

cumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice."

Miller vs. United States, 11 Wall. 268, at p. 310:

"It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies."

Willoughby on the Constitution, Vol. II, p. 1235:

"Whatever interference there may be with his (the citizen's) personal freedom or property rights must be justified, as in the case of the police power, by necessity, actual or reasonably presumed."

We are not surprised at the firmness with which the arrogation of military power in the discharge of civil duties has been unanimously rebuked by courts, even when their judgment seemed to draw in question the martyred Lincoln's acts.

The supreme court of Illinois, speaking in *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159, at p. 170, said:

"The doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guaranties for liberty and property, finds no support in the constitution, and is inconsistent with every principle of civil liberty and free government."

And in the concurring opinion, at p. 179, Justice Breese said:

"The constitution of the United States was designed by its framers, and has been hitherto so

understood by the people, to be the same protecting instrument in war as in peace; that a state of war does not enlarge the powers of any one department of the government established by it, nor has any one of these defendants any right to urge 'necessity,' or 'extraordinary emergencies,' as a plea for the usurpation of powers not granted."

A case arose in Kansas where a law had been enacted providing that members of the national guard should, while in the performance of military duty, be transported on all railroads of the state at the rate of one cent per mile, a situation quite closely analogous to a similar enactment by Congress, or an enactment purporting to confer power to have governmental messages transmitted at one-half or one-third their cost, or at such amount as Congress might have seen fit to fix, the only difference being that in the supposed case Congress acted directly, while in this case the postmaster general is seeking to act in the exercise of some supposed delegation of power.

As the Kansas court said *In re Gardner*, 84 Kans. 264, 113 Pac. 1054, 33 L. R. A. (N. S.) 956, at 958:

> "Without any ground, therefore, for the classification, and without any regard to the reasonableness or unreasonableness of the regulation, the state simply demands that its troops be transported by rail at the purely arbitrary rate, which, so far as the principle involved is concerned, might be 1 cent per hundred miles, or nothing at all."

And at p. 959:

> "An effort is made to justify the statute as an exercise of the military power of the state to pre-

serve peace, to suppress riots and insurrections, and to repel invasion. These are ends which every sovereignty must have the power to attain, and every citizen holds his property upon the implied condition that it must be surrendered when needed for the preservation of the government. Fields and farms may be traversed and occupied, subsistence, stores, and other movables may be appropriated, and transportation lines may be seized and operated, under the stress of due occasion, just as city blocks may be demolished to arrest the progress of a fire. Doubtless, in cases where neither the power of taxation nor the credit of the government would avail, a forced loan could be effected by the seizure of money itself. The power exercised in such cases is lawful, although not derived from constitutions or statutes. It rests upon the principle that every sovereignty may in time of peril adopt such extreme measures as may be necessary for existence and perpetuity. But it is limited to emergencies which cannot wait upon due process of law. The law governing military impressment of private property was well stated by Chief Justice Taney in the case of Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75," as quoted above.

And on page 960:

"When, however, the government is in no extremity in fact which requires the suspension, in whole or in part, of the civil laws, contributions to its support cannot be levied upon private persons or corporations, except pursuant to laws which prescribe the occasion, modes, conditions, and agencies for the appropriation, and which bear equally upon all those who are similarly situated."

State ex rel. Mays v. Brown, 45 L. R. A. 996 (N. S.) 77 S. E. 243 (W. Va.)

Willoughby on the Constitution, p. 1243:

"Private property may be seized and appropriated to a public use without the consent of the owner, when the public necessity demands. This taking of private property is, however, the courts have declared, not an exercise of military power which gives to the owner no claim for compensation, but a taking for the public use which, under the provision of the Fifth Amendment, demands that compensation be made. The manner of taking may, however, be that of the police power, in that the urgency may not permit the ordinary proceedings for valuation and condemnation."

Jones v. Seward, 40 Barbour 563, at p. 573:

"In sudden emergencies, caused by invasion or insurrection, the power expressly given by the constitution and the acts of congress, to repel the one and suppress the other, are ample and effective; and it requires no exercise of arbitrary power over the sacred rights of personal liberty to accomplish this purpose. It is as manifest as the day, it is beyond all controversy, that these rights, in war or in peace, during invasion or domestic violence, even during the hideous rebellion which now confronts us, are, except in the cases which I have stated, inviolable. The president, therefore, whether in his civil capacity or as commander in chief of the army and navy of the United States has, unquestionably, no power to authorize the act of which the plaintiff complains."

Corbin v. Marsh, 63 Ky., II Duvall, 193:

"* * * We premise that the constitution of the United States, in its declared and necessary supremacy, is the same fundamental, paramount, and inviolable *law* of the sovereign people, at all times and under all circumstances—that it is supreme over all—the citizens, the States, and the

national government in all its departments and operations, military as well as civil—and that it is as supreme in war as in peace."

And finally, the fallacy of this proposition would have seemed forever set at rest by this court in its classic statement of the law in *Ex parte Milligan*, 4 Wall. 2, at pp. 120–121, which is likewise quoted in the brief of Mr. Hughes (p. 32).

III

THERE IS NOTHING IN THE LANGUAGE OF THE RESOLUTION OR IN THE PURPOSE TO BE SERVED WARRANTING THE INFERENCE THAT CONGRESS INTENDED TO INTERFERE WITH STATE REGULATION OF INTRASTATE RATES, BUT ON THE CONTRARY, IT AFFIRMATIVELY APPEARS THAT IT DID NOT INTEND SUCH INTERFERENCE.

1. The rule that clear and explicit language is required to take the power of regulation from the state government.

Assuming that Congress might by appropriate action invade the exclusive domain of state regulation of intrastate matters, we contend that such invasion is never to be presumed and is never to be held consummated, except and unless the act of Congress employs such phraseology, as to leave the intention to divest the states of their sovereign power, an absolutely unescapable conclusion from the words employed. Cases will be submitted below,

arising necessarily and naturally under phraseology where it was contended that the state had voluntarily divested itself of the power of regulation. And if, as we shall see, a very strict rule is laid down to guard against such result, unless an absolute necessity from the language of the act construed, how much more rigid must the rule be where the court is asked to find that such power is being taken from a sovereign state, not by its voluntary act, but involuntarily over its protest, and from a domain or sphere that has always been jealously protected and guarded as peculiarly and exclusively within the scope of state regulation, and state regulation alone.

(a) In delegation to municipalities.

The supreme court of Wisconsin has ruled upon this proposition.

Manitowoc v. Manitowoc & Northern T. Co., 145 Wis. 13, at p. 28:

> "It is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating tolls."

The supreme court of the United States has ruled upon the proposition in repeated instances with decisive language. Illustrations follow:

> *Railroad Commission Cases*, 116 U. S. 307, at p. 325:
>
> "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power."

Home Telephone Co. v. Los Angeles, 211 U. S. 265, at p. 273:

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point. * * * But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

Stanislaus County v. San Joaquin, 192 U. S. 201, at 210–211:

"To regulate or establish rates for which water will be supplied is in its nature the execution of one of the powers of the State, and the right of the State so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain."

Freeport Water Co. v. Freeport City, 180 U. S. 587, 599. The court said:

"The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases," quoting the language of *Railroad Commission Cases*

above, and adding: "The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted."

Owensboro v. Owensboro Waterworks Co., 191 U. S. 358. Same rule, citing *Railroad Commission Cases*, and others.

Joplin v. Light Company, 191 U. S. 150, 156: "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied."

Nelson v. City of Murfreesboro, 179 Fed. 905, stating the strict rule to be applied in determining whether a state has been divested of sovereign or governmental power, adopts the language of other cases, and says, at 911, that it must be "in language explicit and express or necessarily to be implied from other powers," and that "if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

Citizens' St. Ry. v. Detroit Ry. Co., 171 U. S. 48, lays down this test for determining whether the sovereign state has been divested of governmental power:

"The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in *Grand Rapids &c. Power Co. v. Grand Rapids &c. Co., supra*, says: . . . 'that municipal corporations possess and can exercise only such powers as are 'granted in *express words*, or those *necessarily* or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*'' The italics are his. This would make 'necessarily implied' mean inevitably implied. The Court of Appeals of the Sixth

Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in *Wilkinson v. Adam*, 1 Ves. & B. 422, 466, that 'a necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed.' "

(b) In assumption by federal government.

We find that the supreme court of the United States has not been silent upon the proposition suggested as to its attitude when an effort was made to pare away any of the inherent police power of the state by congressional action, but sustains with equal emphasis the doctrine that such jurisdiction and control is never deemed to have been divested by mere implication.

In *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, speaking of the rule to be applied to its creature and agency when engaged in purely intrastate business, the court said:

"It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in *language whose meaning would be clear.*"

In *Reid v. Colorado*, 187 U. S. 137, 148, the court, speaking by Mr. Justice Harlan, said:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when

it may do so, unless its purpose to effect that result is clearly manifested."

In *Savage v. Jones*, 225 U. S. 501, 533, the court said:

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." (Citing many cases.)

M. K. & T. Ry. Co. v. Harris, 234 U. S. 412, at pp. 418–419:

"A state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject."

Ill. Cent. R. R. Co. v. Public Utilities Comm. 245 U. S. 493 at 510.

"In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done unless, and except so far as its purpose to do so is clearly manifested."

2. No language used clearly manifesting intention to divest state of rate making power.

What, then, is the language "whose meaning is clear," which "fairly interpreted is in actual conflict with the law of the state," whose purpose to effect that result is clearly manifested, under which the states are to be held divested of the rate making power? Where is "the actual repugnancy" found?

The language of the act is before the court. The solicitor for the Postoffice Department has said:

> "It would seem that language could not add anything to the sweeping power to *possess*, to *control*, and to *operate* in such manner as the President should deem *needful* or *desirable*."

But the law does not say that. It says, "as may be needful or desirable," not "as the President may think needful or desirable." And of course the last words quoted are clearly modified by the prior language of the act, relating to the national security or defense.

The proclamation of the President, in express terms, states: "It is deemed necessary for the national security and defense * * * to operate the same in such manner as may be needful or desirable." This phrase, "needful or desirable," we think, must necessarily and naturally be construed as referring to and stating such quality of necessity or desirability as is required for the national security and defense. It does not, of course, refer to a need or desirability from the standpoint of the telephone companies themselves, but is solely the necessity or desirability

of furthering the national security or defense that is to be considered. In other words, the postmaster general and the President are to operate the telephone system in such manner as may be needful or desirable to secure or to bring about the national security and defense.

(a) President sole judge of necessity of taking, but not of method of operation—Cannot exercise arbitrary power.

A distinction, we think, is here recognized. The President is the *sole* judge of whether or not it is necessary to take possession, assume control, and operate the telephone systems, but unlimited discretion and power is not conferred upon him as to the manner of such operation. He and the postmaster general, we think, are expressly limited in their jurisdiction to operation in such manner as may be needful or desirable for the national security or defense, and *they are not* the sole judges of what manner is needful or desirable for the national security or defense.

(b) Question whether given manner of operation is needful or desirable is for the court.

Assuming that the words employed were broad enough to confer the power to regulate rates—and we think they are not—the court is free to inquire as to whether any act to be done has any necessary or proper relation to the national security or defense, and as a necessary preliminary to sustaining the exercise of power, has a right to determine whether

or not any proposed action has, in any reasonable view of the matter, any relation at all to the "national security or defense."

The act does not in express terms invest the President with the determination of what is "needful and desirable." And consequently, having exercised the power to take over the lines in their operation, he is limited by what is actually needful or desirable in the interest of the national security and defense. In other words, *it is for the court* and not for the President or postmaster general to determine whether it was either needful or desirable to intrude into the domain of state regulation and arrogate the power of regulating purely local rates. And if there is, in fact, no basis for saying the abolition of state regulation is either needful or desirable in the promotion of the national security, then the court will say that the postmaster general has not the power to make the encroachment. Such, we think, is the clear effect of the case of *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, where the court said:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed *by no other officer, administrative body, or tribunal under our Government.* It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by *administrative fiat.* Such authority, however, beneficently exercised in one case, could be injurously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of *all arbitrary exercise of power.*"

This case is cited in the brief of Mr. Hughes with many others, to the proposition "that Congress could not constitutionally delegate and by the joint resolution did not attempt to delegate to the President arbitrary power." Among other cases cited are:

Yick Wo v. Hopkins, 118 U. S. 356, 369, 370;
Field v. Clark, 143 U. S. 649;
Buttfield v. Stranahan, 192 U. S. 470;
Union Bridge Co. v. U. S., 204 U. S. 364;
Lewis v. Frick, 233 U. S. 291, 297;
Gegiow v. Uhl, 239 U. S. 3, 9;
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94;
Philadelphia Co. v. Stimson, 233 U. S. 605, 620;
Degge v. Hitchcock, 229 U. S. 162, 171.

Apparently that was just exactly the theory entertained by the court, in the case of *United States Railroad Administration v. Burch*, 254 Fed. 140, decided November 30, 1918, reported February 6, 1919, where it was said:

> "Under this statute, the President could authorize the Secretary of War only to take possession of such property as he himself is authorized to take possession of under the statute. The extent of his powers, and the definition of what property he was authorized to take possession of under the statute, would be necessarily a judicial question."

The circumstances under which the power is attempted to be exercised in the present case clearly negative any relation whatever to the national security and defense, because the step was not undertaken until a full month after the armistice was signed; and when the national security and defense were no longer subject to any actual or even potential

challenge. This would clearly be sufficient to negative and overthrow the validity of the exercise of the power in the instant case.

Consequently, it is our position and belief that the act, without the proviso, does *not* clearly indicate a purpose to take the rate making power from the states.

The natural and ordinary meaning of the language employed is that aptly used in the creation of a receivership. This, we think, is the terminology employed. By reference to general language on the subject, we are struck at once with the practical identity of the phrasing.

3. Use of terms, "supervision," "possession," "control," and "operation," as found in the law of receivership.

23 *Am. & Eng. Encyc.* 1000. "A receiver is an officer of the court through whom the court takes possession of property. * * * (1086) When appointed he is entitled to take *possession* and *control* of the property or funds involved and to manage and dispose of the same under the direction of the appointing court."

24. *Am. & Eng. Encyc.* 4. "A receiver of a railroad is merely such a functionary appointed for the purpose of taking possession and generally *operating* and managing for a time a railroad under the *orders* and *control* of the court."

34 *Cyc.* 16 refers to a receiver as an indifferent person appointed by the court "to hold *possession* and *control* of property which is the subject matter of litigation."

And it is said at page 284 that while the court "will not usually appoint a receiver to permanently continue such *operations*," it may do so, in the exercise of a wide discretion. While it is ,of course, a commonplace of the law of receivership that the functions of the receiver are exercised under the *supervision* of the court (as appears from the subtitles, 34 *Cyc.* 246, Supervision, Orders, and Instruction of Court; 248, Exercise of Supervision), we find, therefore, that all of the terminology employed in this act is such as is customarily found in the law of receiverships and the provisions for their appointment.

A receiver might have been appointed by a court in a proper case to take possession and assume control of any individual telephone and telegraph system and to operate the same in the discretion of the court, such possession, control, and operation all being exercised under the supervision of the court, and it is submitted that the only difference between such receivership and what was intended by the present act was that, instead of one receiver appointed for one system, and another receiver for another system, what was done by Congress was, in effect to subject the entire telegraph, telephone, cable, and radio systems of the United States to a receivership, and to invest the President, if he saw fit to exercise the same, with jurisdiction to supervise the operations of such systems, as a court of equity would supervise them, and to take possession and assume control and operate the same as a court of equity would do through its receiver. This, we think, is the natural and ordinary meaning of the language that Congress used, and that the president employed in his delega-

tion of power. As a receiver is appointed in an ordinary case to conserve the property and prevent the dissipation of assets on behalf of the creditors and stockholders, so in this case, in the language of the act as originally introduced, possession, control, supervision, and operatioon were to be exercised, "to insure the continuous operation of electrical communicating systems."

Such has been recognized to be the status of the Director General of Railroads. In *Rutherford v Union Pac. R. Co.*, 254 Fed. 880, it is said, at p. 881:

> "Under these acts of Congress and the proclamation of the President the Director General is a carrier. He conducts the business of receiving and transporting goods and passengers for hire. A receiver of a railway company is a carrier as to the goods and passengers transported, (*United States v. Nixon*, 235 U. S. 231, 234, 35 Sup. Ct. 49, 59 L. Ed. 207; *United States v. Ramsey*, 197 Fed. 144, 146, 116 C. C. A. 568, 42 L. R. A. (N. S.) 1031), and the office of the Director General is analogous to that of a receiver of the railway companies."

Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, 253 Fed. 453 (Advance Sheets):

Head Note: "A court cannot authorize its receivers for a street railroad company to charge a higher rate of fare than that fixed as a maximum by the company's franchise."

Ohio & M. R. Co. v. Russell (Ill.), 3 N. E. 561, was was an action that had to do with enforcing c. a police regulation in the narrower sense of requiring the construction of a fence on the railroad right of way. The railroad sought to escape liability, on the ground that it was "in the hands of a receiver" under

an appointment of a court of competent jurisdiction with full power to operate such road to the exclusion of its employes. The court says:

> "The action is against defendant for the nonperformance of a duty imposed by statute, against which, it is apprehended, no order of a court can avail to relieve it. It is a police regulation to which the corporation is subjected by the sovereignty of the state, and it is not within the rightful jurisdiction of the court, either state or federal, to arrest its operation. Notwithstanding the appointment of the receiver, the corporation is clothed with its franchises, and such corporation still exists. The effect of the appointment of the receiver is simply to give him the temporary management of the railroad, under the direction of the court, instead of the manager appointed by the directors of the corporation. It is that, and nothing more. * * * It is a principle well understood that all railroad or other corporations transacting business in its nature public are subject to all reasonable police regulations deemed necessary for the common welfare. The mere fact its property may be temporarily in the hands of a receiver does not relieve a corporation from the operation of such regulations, any more than a private citizen is released from the duty to observe the law because his property may be sequestered by the order of a court for the benefit of his creditors."

4. Analogy to the powers of the alien property custodian.

Section 12 of the trading with the enemy act of Congress, approved October 6, 1917, defines the powers of the Alien Property Custodian, as follows (See Clark on Receivers, p. 1219):

"The alien property custodian shall be vested with all of the powers of a *common-law trustee* in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the *supervision* and direction of the President, and under such rules and regulations as the President shall prescribe, may *manage* such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded."

The language used in this act is just as general and just as broad in its results, in our opinion, as the socalled wire control bill, except that it specifically states that the custodian is to have the powers of a common law trustee. It also provides, however, that he is to act under the supervision and direction of the President and under such rules and regulations as the President shall prescribe. Assuming that the custodian had come into possession of a telephone system by virtue of this act, could it be successfully argued that either he or the President had the power to fix the rates, by virtue of the language, "supervision and direction of the President" and "rules and regulations as the President shall prescribe?" Here we have the use of the apt term "regulations," and yet, to our mind, it could not be said that this gave the power to fix rates. The property, in either case, has come into the government custody in the exercise

of exactly the same so-called "war power," but there is no relation in either act between the necessities and the requirements of the real situation and the regulation of rates, and we think that such power was no more conferred in the one case than in the other.

5. Power to fix rates granted in express terms in other cases.

We find that section 582 (U. S. Comp. St. 1918, Compact Edition), prescribing the duties of the postmaster general, provides:

> "It shall be the duty of the Postmaster General:
> * * *
> "Ninth. To superintend generally the business of the department."

Superintend and supervise, we take it, are absolutely identical in meaning, and supervision is the act of either superintending or supervising. But under the use of this phrase, which is identical with the one employed in the present case, the postmaster general does not have the power to fix the rates of postage.

We find that he does have that power with reference to telegraph rates. Title LXV of the Revised Statutes relates to telegraphs. This act in its original form (see sec. 10076, R. S. 5267) was entitled, "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes." Sec. 10075 (R. S. 5266) provides that—

> "Telegrams between the several Departments of the Government and their officers and agents, in

their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, *at such rates as the Postmaster General shall annually fix.*

Subsequently, an act was passed August 7, 1888, and Congress again industriously wrote into the statute the proviso:

"Nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in the United States, or any authority that the Postmaster General now has under title sixty-five of the Revised Statutes *to fix rates*, or, of the Government, to purchase lines as provided under said title, or to have its messages given precedence in transmission."

Congress made use of abundant phraseology, employing the terms, "supervision," "possession," "control," and "operation." Had it intended to include the rate making function, it would have used the simple expression, "to fix the rates." That the act of fixing rates is an act of regulation is, of course, commonplace. We find that the Interstate Commerce Commission is created by "The act to regulate commerce."

U. S. Compiled Statutes, 1918 Edition—

Sec. 7707. Regulation of Commerce and Navigation.
Sec. 8057. Regulation of Vessels in Domestic Commerce.
Sec. 8151. Regulation of Steam Vessels.
Sec. 8277. Regulation of Motor Boats.
Sec. 8563. Regulation of Common Carriers of Interstate and Foreign Commerce.

Sec. 3115–⅛kk. Giving the President power to fix price of wheat. Specifically confers that power.

Sec. 3115–⅛q. "President * * * authorized to fix the price of coal and coke."

Possibly no more significant illustration of the practice of Congress could be given than in the "Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes," approved July 18, 1918, two days after the passage of this act, in which it is provided by sec. 6:

"That the President shall have power to determine, prescribe, and enforce reasonable freight rates and the terms and conditions of affreightment which shall govern the transportation of goods on vessels of the United States, which shall be filed with the United States Shipping Board and open to public inspection. It shall be unlawful to charge or collect any compensation for the transportation of goods on any such vessel, or to enforce or attempt to enforce any terms or conditions of affreightment, or to make or receive any payment or do any act with respect to such transportation, not in accordance with the rates, terms, and conditions so prescribed, anything in any contract, whether heretofore or hereafter made, to the contrary notwithstanding."

Section 7431aa, which relates to the transportation of mail matter by urban and interurban electric railway common carriers, was enacted July 2, 1918. This would seem a matter peculiarly appropriate to leave to the postmaster general, and yet we find Congress providing:

"The Interstate Commerce Commission is here-

by empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of mail matter."

So that Congress was perfectly familiar with the term and had frequently employed it with definite significance, and had rate regulation been intended, that purpose would have been naturally and ordinarily accomplished by using those two words in the portion of the act conferring powers upon the President.

6. Proviso specially reserves rate making power to the states.

But we are not left to the necessity of judicial determination in any given case as to whether the intrusion into the domain of state regulation of intrastate rates is "needful or desirable" for the "national security or defense." Congress has industriously, and as we think, in a spirit of abundant caution to insure the resolution from attack as unconstitutional because in conflict with the tenth amendment, indicated that it did not intend to interfere in general with the police power, or police regulation, or rate regulation of the states. The resolution concludes with this proviso:

(a) Language used.

"That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may

affect the transmission of government communications, or the issue of stocks and bonds by such system or systems."

(b) Purpose to insure constitutionality.

It is our judgment that probably this was unnecessary, and a mere confirmation of what the court would have held the law to be, in the absence of any proviso at all, and as we suggest, its primary office was to insure the constitutionality of the resolution.

Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, at p 242:

> "As said by Mr. Justice Story, in *Minis v. United States*, 15 Pet. 423, 445:
>
> " 'The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generalities, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview.' "

This case is cited with approval in *Austin v. United States*, 155 U. S. 417, 431, and in *White v. U. S.*, 191 U. S. 551.

> "*Ann. Cas.* 1912C, 1088. Note: "The word 'provided,' as used in a statute generally implies a limitation or restriction upon what has preceded in the context."

Such, we think, is the effect of the proviso here, "to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

(c) Regulation of telephone rates included in "police regulation."

Regulation of telephone rates is an exercise of the police power of the state, consequently a police regulation, and therefore excepted by the proviso.

Note, Ann. Cas. 1912D, p. 308:

"A telephone company is engaged in a 'business affected with a public interest,' and the state in the exercise of its police power may regulate the rates and charges of such company, and provide a maximum rate which the charge shall not exceed, provided that the rate prescribed is reasonable. *Chesapeake, etc. Telephone Co. v. Manning*, 186 U. S. 238, 22 S. Ct. 881, 46 U. S. (L. Ed.) 1144; *Cumberland Telephone, etc. Co. v. Louisville*, 187 Fed. 637; *Hockett v. State*, 105 Ind. 259, 5 N. E. 178, 55 Am. Rep. 201; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Johnson v. State*, 113 Ind. 143, 15 N. E. 215; *Central Union Telephone Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Pioneer Telephone, etc. Co. v. Westenhaver*, 29 Okla. 429, 118 Pac. 354; *State v. Superior Ct.*, 67 Wash. 37, 120 Pac. 861. See also *Munn v. Illinois*, 94 U. S. 113, 24 U. S. (L. Ed.) 77; *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113."

(d) The use of the phrase, "the issue of stocks and bonds by such system or systems."

The argument has been made that the term "police power" has two meanings: (1) The ordinary narrow, restricted meaning which has to do with matters concerning the public health, public morals, and public safety; (2) the broad police power which has been sometimes characterized as coextensive with the power of government itself. While conceding

that police regulations are to be treated as synonymous with the expression of police power, it is insisted that, in this act, the term was used in its ordinary or narrower sense, and that the proviso reserved to the states only the exercise of such lawful police regulations as might affect the health, safety, and morals.

It is elementary, of course, that meaning must be given to ever yphrase and sentence in the act, and when we find that Congress has industriously written into the act the proviso that lawful police regulations are reserved to the states, except wherein they "may affect * * * the issue of stocks and bonds by such system or systems," we are confronted at once by the proposition that whatever power of police regulation was intended to be preserved to the state by the proviso was one which, in legislative contemplation, necessitated an exception so as to make it inapplicable to the "issue of stocks and bonds by such system or systems."

The issue of stocks and bonds, of course, cannot in any way be affected by regulations that have to do with the public health or the public safety or the public morals, unless, of course, argument should be made that such restraint as might exist to prevent the exercise of fraud—that is, the criminal jurisdiction of the state—was to be suspended in behalf of the postmaster general. It will not be seriously contended, we think, that Congress had any such idea in mind. Obviously, what it had in mind was the provisions found in public utility statutes quite generally, and which are embodied in sections 1753—1 to 1753—22, Wis. Stats., which provide for application to the railroad commission

and the issue of a certificate of authority stating the amount of such stocks, purposes for which they are issued, etc., and provide for the ascertainment of the value of the property of the utility, preliminary to the issuance of such certificate. This, we submit, most obviously was the character of police regulations that Congress had in mind, and it requires no argument, of course, to establish that this matter of regulation and supervision of the issue of corporate securities stands upon exactly the same footing and is referable to that broad form of the police power under which the power to regulate rates is derived.

The preliminary investigation preceding the fixing of a rate, and that preceding the authorization of stocks and bonds, are substantially the same. In the one case (1753—9, subsec. 2 to 1753—9, subsec. 8), it may make a true valuation of the property preliminary to authorizing the issue of stocks and bonds, while 1797m—5 provides for such valuation as a basis for the determination of reasonable and just rates. So that if the power to regulate the issue of stocks and bonds had remained unimpaired up to the insertion of this exception in the proviso, it must unquestionably follow that the power to regulate rates had been preserved up to that point, because the two species of regulation are absolutely referable to the same classification of power. The power reserved could not have been broad enough to authorize the valuation of property with a view of determining the amount of stocks and bonds that might be legitimately issued, without, as a necessary corollary, having been broad enough to preserve exactly the same species of power predicated upon an

almost identical procedure under which the state regulated the rate of return upon the utility.

We have therefore, in this concluding sentence of the resolution, an express declaration that, in the contemplation of the framers of the law, up to the point where this exception was inserted in the resolution, the fundamental residuum of police power in its very broadest sense, under which it is agreed the power to regulate rates arises, had been left unimpaired and undisturbed in the inherent possessors of that power—the states.

7. The debates in Congress disclose that the evil against which both the telephone and telegraph and the railroad acts were directed was not the evil of diverse state regulation.

We are entirely disposed to agree with the Solicitor for the Post Office Department that "The circumstances in which it was enacted and the ends and aims it was to subserve are all-important factors in determining its meaning." What, then, were the circumstances surrounding the enactment of the legislation? To ascertain them we have under elementary rules the right to consult the debates in Congress to ascertain the evil which the legislation was designed to correct—the circumstances in which it was enacted. These debates are not, of course, controlling as determining "the meaning of that language of a statute passed by that body."

It has been repeatedly held, however, that such

debates may be consulted for the purpose of ascertaining the evil which the legislation was designed to correct. Declarations of this rule are frequent.

(a) Authorities permitting examination of debates

Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6, at p. 546.
Jennison v. Kirk, 98 U. S. 453, 459, 25 L. Ed. 240.
Roberts v. Southern Pac. Co., 186 Fed. 934, at p. 938.
Wadsworth v. Boysen, 148 Fed. 771, at page 778.
American Net & Twine Co. v. Worthington, 141 U. S. 469, 473.
Standard Oil Co. v. U. S., 221 U. S. 1, at p. 50.
Tap Line Cases, 234 U. S. 1, p. 27.
In re Gerdau, 54 Fed 143, 145.
Rector v. U. S. 143 U. S. 457, 12 Sup. Ct. 511, 513.
Shallus v. United States, 162 Fed. 654, h. n. 5.
United States v. Chicago & N. W. Ry. Co., 157 Fed. 616, 618.
United States v. Board of Commissioners of Osage Co. Okl. et al., 193 Fed. 485, 486, h. n. 6.
Black on *Interpretation of Laws*, 2d ed., Contemporary History, 285.

(b) The history of the wire control act.

This was first introduced as a joint resolution by Mr. Aswell, June 27, 1918, page 9080, Congressional Record, referred to the Committee on Interstate and Foreign Commerce. Page 9368, July 2nd by unanimous consent the resolution was transferred to the Committee on Military Affairs.

9378—Motion was made to reconsider this action

by the chairman of the committee to whom it was originally referred and after debate, this was agreed to; and on reconsideration, the matter was left with the original committee (9380).

On July 4, page 9411, the resolution was reported with an amendment. The discussion of the measure commenced July 5th. At page 9465, the original resolution and the amendment are set out in full. The same follow:

"Joint resolution (H. J. Res. 309) to insure the continuous operation of electrical communicating systems, to guard the secrecy of war dispatches, and prevent communications between public enemies.

"*Resolved, etc.*, That the President, if in his discretion it is deemed desirable, in order to insure their continuous operation, or to guard the secrecy of military and governmental communications, or to prevent communication by spies and other public enemies thereon, or for other military or public reasons, shall have power to take possession and control of any telegraph, telephone, marine cable, or radio systems, and operate the same subject to those conditions of law, so far as applicable, which are in force as to steam railroads while under Federal control.

"Also the following committee amendment was read:

"Committee amendment: Strike out all after the enacting clause down to and including the word 'control,' in line 4, page 2, and insert in lieu thereof the following:

" 'That the President in time of war is authorized and empowered to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the dura-

tion of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace:

" '*Provided*, That just compensation shall be made for such supervision, possession, control, or operation.' "

(a) Debates disclose that evil to be remedied was not regulated by state commissions.

During the course of the debate, Mr. Esch offered the amendment as it now stands, relative to compensation, stating that it was the language in the bill giving "the power of taking over the ship yards" (page 9466).

On the same day, July 5, 1918, (See Congressional Record, page 9473), the last part of the resolution was introduced by Mr. Montague.

Mr Sims said (Congressional Record, July 5, 1918, p. 9475):

"But looking at the resolution, which is in the exact language, word for word, of the act of 1916 under which the railroads were all taken over, and then considering the great railroad-control bill as we did for many weeks, in which every question pertaining in nature and substance to this resolution was discussed, I thought it would be an assumption on my part to repeat at great length in a report information which everybody knows. * * *

"I am not prepared to say that it will not become necessary, but I hope it will not become necessary, and if it does not it will not be done. Therefore there was no use in a long program of detailed legislation as to the operation, as to the compensation, in advance of whether or not it would ever become necessary to consider such legislation. If it is found necessary by the President to exercise the

power herein conferred, as a matter of course Congress will do as it did in the railroad-control matter. There will be supplementary legislation to take care of every question that will arise, and it will not be railroaded through the House without ample time for consideration."

"I do not think there is the remotest possibility of the Government taking supervision because they are now supervised by different States." (P. 9477.)

At page 9478 the proviso was read again by the clerk and the following question and answer appear with reference to it:

"MR. ESCH. Is that language the language of the railroad act?

MR. MONTAGUE. It is, except that the language of the railroad act is 'transportation of troops, war materials, and Government supplies.' Of course, that language is inapplicable to this bill, and I simply used the language "Government communications,' which would embrace all communications by wire or telephone."

And again it was stated:

"MR. MONTAGUE. Does the gentleman carry in his mind the distinction between regulation and limitation? We in this committee have not brought in any measure of a regulatory character. The amendment that I proposed is simply an amendment of limitation and preservation of existing powers."

At 9479, we find the interesting statement in response to the suggestion which has been urged in other arguments, that the President already had the power:

"MR. SIMS: I think I can suggest a fair approach

to an answer to the question whether or not the President has the power contained in this resolution, that it was submitted to the Department of Justice and after a thorough investigation and study the Department of Justice reported to the President that he did not have the authority."

At page 9481, the title was then amended by unanimous consent to correspond with the resolution.

The matter came up for consideration in the Senate in its amended form (July 6, page 9502), and under its present title was referred to the Committee on Interstate Commerce. On July 8th, page 9610, it was reported back with recommendation, after consideration of a little over an hour (9611).

On page 9614, we find the suggestion made as to the possibility of a strike. It was stated at 9614 by Mr. Penrose:

"Mr. President, I do not think in the history of any legislative body from here to Russia has a more high-handed proceeding been perpetrated than that which we have witnessed this afternoon. I speak coolly and advisedly, although my indignation runs high. We are supposed to be in a battle for liberty and to be engaged in a tremendous conflict to bring about the downfall of autocracy, and yet here in the Senate of the United States every principle of orderly constitutional procedure and of liberty has been outraged and violated."

And at 9617, it was referred back to the committee. On July 10th, Congressional Record, page 9685, it was again reported and read by title. At 9729 on July 11th, the matter was again brought up for consideration. Reference was made by Mr.

Smith to the question of tolls in the following language and upon possible abuse:

"The question of tolls and rental and hours of service is very important to the telephone patrons, and any unnecessary interference with present plans should have the most careful consideration."

This discussion was resumed on July 11th, page 9732. It was stated at 9733 by Mr. Underwood.

"I will say to the Senator from Ohio that so far as I know there is no emergency which exists in this hour for this legislation. That is the reason why I did not think there were any hearings necessary."

And again at 9735, a colloquy took place between Mr. Harding and Mr. Underwood:

"MR. HARDING. I want to ask the Senator from Alabama if he will not admit, however, that the public-service utilities, which he is proposing to give authority to take over, are already essentially under license and control on the part of the various public utilities commissions throughout the States?

"MR. UNDERWOOD: Well, I think they are throughout the States; and that very fact might hamper the hands of the Federal Government.

"MR. HARDING: Now, if the Senator will tell the Senate how it will hamper the Government, we shall be obliged to him.

"MR. UNDERWOOD: I do not know how it would; I can not answer that question definitely; I say that it might; I do not say that it would; but the fact that those companies are regulated can not affect the situation."

And again at 9736 Mr. Underwood said:

"But I do not think there is any probability whatever of the taking over of the telephones in

this land, except it might be to meet a local situation in some seaport for the moment or the hour; but so far as taking over the telephones of the country is concerned, permanently or in any large class or as a system, I do not think there is any possibility of it."

On the same page a communication from Mr. Burleson is reproduced which says:

"At this moment the paralysis of a large part of the system of electrical communication is threatened, with possible consequences prejudicial to our military preparations and other public activities that might prove serious or disastrous."

And this danger is characterized by Mr. Reed:

"That the emergency now exists in the threatened strike."

9746—July 12th, an amendment was introduced by Mr. Reed. Page 9749, it was stated:

"That the genesis of this proposition is at the Post Office Department, where they hope, under the present exigency, to give it force and effect. I think they are making use of this extraordinary situation to get control of these great arteries and avenues of communication."

At page 9755, letters and telegrams were introduced tending to demonstrate that there was no danger of a strike among the telegraph employees. At page 9801 the speech of Mr. Kellogg on July 11th appears. At 9850 under date of July 13th Mr. Reed states:

"If then the Government should tomorrow take over these utilities and there is no clause written

into the law which will perpetuate the legal right of the citizen to this service, any citizen can be refused that service and he is totally and absolutely without redress, first, because the public use has been absorbed in the sovereignty itself and, second, because he can not sue that sovereignty. Nobody can sue the United States of America except where Congress has expressly granted that permission."

To which Mr. Shields, reading the resolution, replied:

"Now, the question I wish to ask is, Are not the rights of the citizens of which the Senator speaks protected by the provision that this measure shall not be construed to amend, repeal, impair, or affect existing laws referring to taxation or the local police regulations of the several States? Is it not a fact that the right of the general public to be served by public utilities, such as common carriers, hotels, telegraph companies, and telephone companies, comes under the police regulation? Are not all the laws, both common and statutory, governing these public utilities police regulations, and must not the public utility render this service, and is not that preserved in the bill?"

At 9851, Mr. Reed stated further, with reference to his proposed amendment:

"But let us assume that the Senator from Tennessee is right, I do nothing in this amendment but reaffirm and reassert a right and make it clear.

"When these utilities are taken over the administration of their business affairs will be turned over to a vast multitude of men. It almost always happens that some men put into public position become more or less arbitrary, and if they are under no restraints whatever great damage and injury may be done."

At the same page, Mr. Knox stated:

> "It is only written into the resolution that which is approved as a matter of course. It is not a right in my judgment that rests in the police power. It is a right that grows out of the nature of the service that these corporations offer to render to the general public, and we are only writing into the resolution a proposition that in our opinion no operations of these lines, if they are taken over by the Government, will interfere with that natural right. The amendment contemplates and specifically provides that in any situation where the private right and the Government right conflict the private right must give way."

The amendment was rejected by a vote of 27—for and 32 against, 37 not voting. The joint resolution itself was adopted on July 13th, page 9852.

This detailed history of the resolution and its passage is presented, not at all upon the theory of demonstrating what the intention of Congress was, because we think the reference to the debates lends peculiar emphasis to the proposition of their untrustworthy character as a guide to the intention of the legislative body. We find that while there was discussion on the matter in question, Mr. Reed thought it necessary to pass an amendment to insure the citizens' rights; Mr. Shields thought it unnecessary because they were already provided for by the term "police regulation" and Mr. Knox stood for the view that the amendment would only write into the resolution that which was approved as a matter of course.

It is, of course, absolutely beyond human power to determine which view governed the action of Congress, in either house, in adopting the resolution; but

this much does appear: that while a sort of nebulous military necessity was suggested, the exact nature of which no one seemed to be able to find and which all apparently agreed did not exist at the time that the bill was under consideration as a reason for its adoption and that the fact that a strike was threatened was touched upon as a reason for adopting the resolution, throughout the entire debate, discussion and proceedings that have to do with the resolution, there is neither phrase, syllable or suggestion in the remotest possible way indicating that state regulation of rates was a reason for passing the bill. Mr. Underwood in a vague way suggested such interference as a possibility without apparently indicating in what respect it might arise.

8. Argument based on the analogy to control exercised over railroads.

(a) Act for wire control is in pari materia with railroad bill.

It will be admitted that the Federal control of transportation and the same control of the wire communicating systems both relate to the same general subject matter. This, we think, follows from whichever one of several standpoints the matter may be considered. The terms of the rail act authorize the President "to take possession and assume control of any system or systems of transportation" in time of war "for the transfer or transportation of troops, war material and equipment, or for such other pur-

poses connected with the emergency as may be needful or desirable." (Vol. 39, Statutes, p. 645.)

As above set forth, the joint resolution for wire control states that the President, during the continuance of the present war, is authorized, "whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control * * * and to operate the same in such manner as may be needful or desirable for the duration of the war."

The Presidential Proclamation, in the case of assumption of control of the transportation system recites:

> "It has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war."

The Proclamation assuming control of the wire systems uses the language:

> "It is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable."

(b) Rule stated permitting examination of statutes in pari materia or on merely cognate subjects.

In other words, it very clearly appears that the two acts and the proceedings thereunder are related to the

general subject of the national security and defense. In another aspect, they are likewise in pari materia, as having to do with the general subject of the Federal operation and control of public utilities. They are upon the same general subject, in the sense that they deal with the question of interstate commerce, and its regulation with reference to the powers of the states over intrastate commerce. But even though the court should conclude that they are not strictly in *pari materia*, it is very clear that they relate to cognate matters; and whether they are strictly in *pari materia* or merely cognate, under authorities that govern construction established by this jurisdiction and by the supreme court of the United States, they may be referred to.

Smith v. People, 47 N. Y. 330, p. 339:

> "Statutes in *pari materia* relate to the same subject, the same person or thing, or the same class of persons or things, and are to be read together, for the reason that it is to be implied that a code of statutes relating to one subject is governed by the same spirit, and are intended to be harmonious and consistent. They are to be taken together as if they were one in law, as one statute."

Munger v. Lenroot, 32 Wis. 541. Two statutes giving liens on logs although enacted at different sessions and relating to two different sets of counties were characterized by the court as follows:

> "These statutes relating to laborers' liens are in *pari materia* and we may look at one to discover the true interpretation of another."
>
> *Com. v. Ross*, 122 S. W. 161, 135 Ky. 315.

Endlich on the Interpretation of Statutes, 43, 51.

36 *Cyc.* 1147:

"Statutes in *pari materia* are those which relate to the same person or thing, or to the same class of persons or things."

Helm v. City of Grayville, 79 N. E. 691:

"In arriving at the proper construction to be given a statute, other statutes relating to the same subject should be considered. 'Statutes are in *pair materia* which relate to the same person or thing or to the same class of persons or things, and the phrase is applicable to public statutes or general laws made at different times and reference to the same subject.' 26 Am. & Eng. Encyc. of Law (2d Ed.) 621; *South Park Comrs. v. First Nat. Bank*, 177 Ill. 234, 52 N. E. 365; *Stribling v. Prettyman*, 57 Ill. 371."

Indianapolis Northern Traction Co. v. Ramer, 76 N. E. 808, 810:

"The rule of construction by the aid of statutes in *pari materia* does not restrict the court to the consideration of other legislation enacted on the same day or at the same session. The use of the rule, like all other methods of construction, is to ascertain the intention of the legislature by reference to other enactments relating to the same matter or subject—to the same person or thing, or to the same class of persons or things."

The application of the rule and the classification of legislative acts, no more closely related than here, as appertaining to the same general subject matter within the meaning of this rule, are further illustrated by the following cases:

In re Ryan's Estate, (Mo. App.) 156 S. W. 759;
Converse v. The U. S., 62 How. 463;
State v. Esser, (Nev.) 129 Pac. 557;
Westport Stone Co. v. Thomas, (Ind.) 94 N. E. 406;
Greenbush Cemetery Ass'n v. Van Natta, (Ind.) 94 N. E. 899;
State v. Eggers, (Nev.) 136 Pac. 100.

Sutherland Statutory Const.: "Statutes upon cognate subjects may be referred to, though not strictly in *pari materia*."

State v. Summers, 44 S. W. 797:

"Even cognate statutes, though not strictly in *pari materia*, may be invoked and referred to in order to elucidate the legislative intent. Suth. St. Const. 283, 284; *Ex parte Marmaduke*, 91 Mo. 257, 4 S. W. 91."

Schmidt v. Raymond, 148 Wis. 271, 274, construing the effect of the statutory provision for curtesy to a husband in a deceased wife's estate, provisions on the cognate subject of dower were considered: "It is quite significant that, while sec. 3885, Stats. (1898) provides for the admeasurement of dower, in the event of it being necessary to sell the lands of a deceased husband to pay debts, no such provision is found in regard to curtesy. If the legislature had considered that the rights of the husband by curtesy took precedence over the claims of the creditors, no doubt a provision would have been made for the admeasurement of curtesy as well as of dower."

State v. Beck, 21 R. I. 288, 43 Atl. 366, 45 L. R. A. 269:

"A familiar rule in the construction of statutes is that a statute must be construed with reference to the whole system of which it forms a part, and that statutes upon cognate subjects may be referred to though not strictly in *pari materia.* Sutherland Stat. Const. 284."

Smith v. People, 47 N. Y. 330, 339:

"So in case of doubt or uncertainty, acts in *pari materia*, passed before or after, and whether repealed or unrepealed, may be referred to in order to discern the intent of the legislature in the use of particular terms; and within the same rule, and the reason of it, contemporaneous legislation, although not precisely in *pari materia*, may be referred to for the same purpose."

Wnitcomb v. Rood, 20 Vt. 49:

"But when terms or modes of expression are employed, in a new statute, which had acquired a definite meaning and application in a previous statute, on the same subject, or one analogous to it, they are generally supposed to be used in the same sense; and in settling the construction of such statute, regard should be had to the known and established interpretation of the old."

State v. Woodson, 31 S. W. 105, 128 Mo. 497:

"Statutes not strictly 'in *pari materia*'—statutes on cognate subjects—may be brought within range of the construing vision as needed auxiliaries in the work of interpretation."

Cummings v. Everett, 19 Atl. 456:

"The whole body of previous and contemporaneous legislation should be considered in interpreting any statute."

Endlich Interpretation of Statutes, Sec. 52, p. 65:

"The construction which has been put upon acts on similar subjects, even though the language should be different, should for a similar reason be referred to."

26 *Am. & Eng. Encyc.* 623:

"Contemporaneous legislation, not precisely in *pari materia* with the statute to be construed may be referred to on the question of intent."

Vane v. Newcomb, 132 U. S. 220, quotes this language at 236 from *Stout v. Board of Coms.*, 107 Ind. 343, 348, which makes use of it and in turn refers to the earlier case of *Prather v. The Jeffersonville, Madison and Indianapolis R.*, 52 Ind. 16, where it originally appeared. *Chase v. Lord*, 77 N. Y. 1, 18, employs almost the same words. *Matter of Rochester Water Coms.*, 66 N. Y. 422, as does *People v. England*, 91 Hun 152, 155: "Where other acts of the legislature, passed at or about the same time, corroborate the evidence of intent, as gathered from the statutes under review, the duty of the courts is to give effect to the intent rather than to the literal terms of the act."

State v. Wiggins Ferry Co., 106 S. W. 1005, quotes with approval from Sutherland that "statutes on cognate subjects may be referred to," as does *State v. Patterson*, 105 S. W. 1048.

Under elementary rules where a statute or part thereof, adopted from another state or re-enacted in a subsequent statute in the same state, has received a prior construction, such construction is binding

upon the court in its interpretation of the statute so adopted from a foreign state or re-enacted from the body of statutes previously existing. We contend that the reason of this rule sustains this proposition —that where the language of a statute having to do with the same general subject matter is subsequently taken over in substance and in form in another enactment, in case the first enactment has not received definitive interpretation by legislative construction or by the court, in interpreting the second or subsequent enactment, the court will have the right to examine into the facts and circumstances and the general situation surrounding the enactment of the first provision with a view of ascertaining what the particular evil was that the legislative body sought to remedy by the insertion of the particular phrase—and has a right to resort to all legitimate aids in enabling it to arrive at a correct interpretation of the meaning and intent of the first of the two provisions, whether intrinsic in the language employed, or extrinsic thereto, in order to enable it to properly interpret the second enactment in the light of and with the aid of such assistance as would have been available and as would have enabled the court to put a proper construction upon the language of the statute furnishing the source for the enactment in question.

(c) Railroad legislation summarized.

The first provision relative to control of the railroads is found at page 645 of Vol. 39 of the Statutes,

the same being the revenue bill passed by the 64th Congress on August 29, 1916.

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The authority conferred by this proviso was not exercised until the Presidential proclamation of December 26, 1917, which provided that—

"* * * The possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

"Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or

any part thereof may be situated. But any orders, general or special, hereafter made by dais director shall have paramount authority and be obeyed as such."

Following this, and under date of March 21, 1918, the 65th Congress provided for the ascertainment of just compensation for the carriers taken, providing a revolving fund of five hundred million dollars for the purpose of paying the expenses of the federal control, and, so far as necessary, the amount of just compensation. Section 10 expressly provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. * * *

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time

of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition."

Section 15 provides:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

(d) Interpretation of railroad act.

The foregoing would appear to demonstrate very clearly that by the terms of the original Presidential proclamation, the railroads were kept expressly subject to "all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions." The act of March 21, 1918, varied this only to the extent of conferring upon the President the power to initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, while section 15, which provides that "nothing in the act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States," is merely

declaratory of the presidential purpose that such systems of transportation should remain subject to all statutes and orders or regulating commissions of the various states, in which said systems or any part thereof may be situated, with a proviso that the orders of the Director should "have paramount authority and be obeyed as such." In other words, the net effect of the provisions covering the railroad situation was: first, to leave them expressly subject to the control of state commissions and the Interstate Commerce Commission, and, secondly, to give the President authority to initiate interstate rates; but in our opinion, by legislative silence on the subject, to deny him the power to initiate intrastate rates, and by express declaration to re-affirm the policy of leaving the roads subject to the police regulation of the states—clearly used as inclusive and synonymous with the expression used in the Presidential Proclamation of "*regulatory commissions.*"

The foregoing provisions amply demonstrate the contention that we make, that whatever results that were sought to be obtained, were to be accomplished through the medium of speeding up railroad operations from the standpoint of their internal management, and that the status quo, so far as existing laws and arrangements were concerned, was to be disturbed just as little as possible, and only in the specific particulars provided by the Presidential Proclamation and the act of Congress.

(e) The evil sought to be remedied by Congress, as discussed in the hearing before the Interstate Commerce Committee of the United States Senate prelimary to the passage of the bill under which the President received the power to initiate railroad rates.

Prior to the enactment of the legislation of March 23, 1918, the situation of the railroads under the act of Congress and under the proclamation of the President was akin, at least, to the situation of the telephone companies at the present time, and Congress in enacting this legislation had before it the committee hearing on the matter.

It appears at page 499 of the hearing on government control and operation of railroads, pursuant to S. Res. 171:

"Commissioner ANDERSON. I think the power to fix rates, either under the interstate-commerce act or under any State act, has already been taken away, so far as the assertion of the war power of the President under the act of August, 1916, makes reasonably necessary, and that section 11 carries forward precisely the status which I think now exists."

And at p. 751:

"Senator KELLOGG. While the roads are being managed by the Government itself, as a Government institution, do you think the State commissions should be allowed to fix any parts of the rates on the Government property?

"Mr. WALTER. I do, Senator, for this reason: I do not understand that the Government has taken possession of the railroads as it would take possession of a piece of property and erect a build-

ing thereon. My thought is that all the possession they have is the possession to operate the freight thereon, and that you leave to the Interstate Commerce Commission and to the State commissions the exercise of all functions not in conflict with the exercise of the power of movement."

Again, at p. 752:

"Senator KELLOGG. * * * Of course that possession has been taken through the various corporations, but if the Government has the constructive possession of the railways of the country and is operating them as a Government institution, do you think any power except the Federal power should fix the rates and direct the operation of lines in the country?

"MR. WALTER. Viewing the conditions as they are now, I will say yes, that the State commissions ought to be preserved, for these reasons, Senator, if you will permit me a little bit of a long answer. In the first place, it takes a man with some experience and judgment to determine what the reasonable rate is. The State commissions are just as patriotic, as energetic and as desirous of proper results as anybody else. I would leave to them the exercise of their power."

Mr. McAdoo testified before the committee (pp. 843–844):

"The President's proclamation has expressly left that status unimpaired except to the extent that it may be determined in the public interest to alter it from time to time. As it stands to-day the State commissions are exercising precisely their same functions. The Interstate Commerce Commission is exercising its same function, and, for my own part, I think as little disturbance should be made as possible in those matters; yet, at the same time, it is very essential that the President should exercise

his full powers as the public necessity requires. * * *

"It is not only a question of the amount of the rate, but of the effect of the rate upon different communities. Those rates have relation to the economic status and the industrial activities of the country. I think that any man who undertook lightly to disturb that rate structure would be doing a very foolish thing, and naturally the President would not undertake to exercise the power he has under the law to destroy or disturb rates lightly or unnecessarily.

"As I said to the State commissioners who called on me the other day, the ordinary procedure will continue to be observed; that the advice and suggestion and assistance of these commissions could be made of great value in the management of the railroads; that the purpose of the President was and is not to exercise any power he possesses to override the authority of the Interstate Commerce Commission and various State commissions except in cases where it is clearly necessary to do so to meet the war emergencies or to serve the public interest."

Mr. Cowan testified at p. 1148:

"I say, therefore, that if a railroad company, or any other carrier, or Congress, or the State legislature, shall impose a charge above what is reasonable, it is in the nature of a tax. It is unlawful, it is not the standard that the shipper is reasonably entitled to, it is not the standard which the public is entitled to, the railroad has no right to exact more, and the shipper is obliged to pay that.

"* * * I say, therefore, that the suggestion that has been made—and I may parenthetically remark that it is an astonishing proposition to me, coming from the source that it does—that under this bill the President, the Director General, or whoever executes this law might raise the rates

for the purpose of producing revenue for the Government. In other words, exercise the taxing power, if they raise it beyond what is reasonable."

(f) Discussion of bill in Congress.

The bill was presented in the Senate February 11th (see p. 1939, Congressional Record). At 1944 it was stated by Mr. Smith, who had charge of the same:

"The bill under consideration was drafted by the administration and modified by the Interstate Commerce committee of the Senate to meet the situation."

In presenting his summary of the bill to the house, Mr. Sims, who apparently had charge of the same for the administration, stated in the house on February 19, 1918, at page 2337:

"On the other hand, it is manifestly impracticable and undesirable for the President or any agencies he may create to readjust our present rate fabric. Comparatively little of it ought to be readjusted, and such necessary adjustment should come tentatively and only to meet obvious needs. Our committee was of the opinion that section 11 meets the situation in the least objectionable and in the most practicable way. It provides that, except as the President may from time to time otherwise order, rates shall continue to be and to be determined as hitherto.

"This leaves the Interstate Commerce Commission and the state commissions to proceed, precisely as hitherto, in the determination of all rate questions unless and until the President, in the exercise of the war power, shall order otherwise."

Vol. 56, Part III, 65th Congress, p. 2360, contains

a discussion by Mr. Snook of the clause relative to the authority to initiate and fix rates. And on that page appears an excerpt from the testimony of Mr. McAdoo before the committee, in which he states, as to intrastate rates, "I think that the state commissions ought to continue to consider such questions as they rise," and that in a conference he had told them that they should go ahead and hear cases and exercise their powers as theretofore, subject to the power of the President to override their decision when he thought it necessary to do so in the public interest, and stated: "It is therefore plain that there is to be no change in the present method of fixing rates, except in exceptional cases, and then only when an emergency arises making such course necessary."

Senator Underwood, February 20, p. 2377, Congressional Record, contended—

> "that the bill should not be passed unless within the folds of the bill remains the provision to allow the Interstate Commerce Commission to continue to functionate and review any rate that is put upon the people of this country from any source."

At page 2378, Senator Sherman objected to impairing or invading the power of the Interstate Commerce Commission.

Mr. Poindexter stated in the Senate (p. 2387):

> "It was the avowed purpose of the Director General not to interfere in general with the rate making duties and authority either of the Interstate or state commissions."

In referring to this section as "11," Mr. Sims obviously misspoke as the section then, as now was numbered 10 and is the same as printed above and practically identical with the section as finally enacted. At that time, however, there was nothing in the bill in any way corresponding to Section 15 thereof, quoted as above, as finally enacted, except that Section 13 of the act provided: "that nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the states in relation to taxation."

In this form the bill passed the Senate on February 21, calendar day, February 22, Congressional Record, Second Session, 65th Congress, Page 2519.

When the bill went into the House of Representatives it was amended by striking out everything after the enacting clause, making various changes therein, but the most significant was to present for the first time the equivalent of Section 15 as it now appears.

(g) Proposed amendment inserting in proviso the words "the regulation of rates."

Section 16 of the bill so amended provided:

"That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or Government supplies, *the regulation of rates*, the expenditure of revenues, the addition to or improvement of properties, or the issue of stocks and bonds."

This bill, as so amended passed the House of Representatives by a vote of 339 voting "aye," six voting "nay," one voting "present," and eighty-one not voting.

Following the passage of the bill as thus amended in the House, it appears at 2838 and 2839 that the House insisted upon its amendment, and arrangement was made for further conference upon the bill. Thereafter, conference committees were duly appointed, and the bill in its present form reported to both Houses, with the phrase "regulation of rates" omitted.

The conference report on the railroad bill was presented to the Senate, March 13, 1918, debated, and rejected on a point of order, which appeared to call for the discussion of the intent and effect of the proviso under consideration here.

The Vice-President stated (p. 3420, Congressional Record):

> "The Senate of the United States passed this proviso in this bill:
>
> " 'That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation.'
>
> "The House of Representatives, in the substituted bill, included that language exactly, and added to it:
>
> " 'or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditure of revenues, the addition to or improvement of properties, or the issue of stocks and bonds.' "

Mr. Pomerene stated:

"It is true that one of the subjects of state control has been the question of taxation. The Senate adopted the provision as read. The House adopted that provision plus something more, namely, a limitation upon the power of the State over the subject of taxation. But that was not all. The House went further and said upon the subject of control, we are going to reserve to the States the power over the subject of taxation and *also the police power of the states* as theretofore."

At page 3432, Senate Bill 3752 was again submitted to the Senate by Mr. Smith, of South Carolina. The bill as finally adopted appears in the Record in full (pp. 3433–3435). From 3436 to 3443, there is a discussion of the bill, and the record of its adoption appears on that page, on March 13, 1918; but nothing in the discussion throws any further light on the intent and meaning of the proviso here in question. On the same date (3461–3462), conference report was presented in the House by Mr. Sims of the committee. At 3492, it was again called up by Mr. Sims. At 3495, March 14, there appears a statement presented to accompany the bill, in which it was said:

"The conferees agreed to strike out section 16 of the House amendment and substituted therefor a new section as set out in section 15 of the conference report. The substitute section provides that this act shall not be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to the lawful police regulations of the states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

At 3496, there is a significant and interesting statement not bearing on the question here, but in a general way bearing on the scope of the power conferred by Congress, made in the House by the chairman of the conference committee, Mr. Sims:

> "Mr. Speaker, if the order of the President violated the provisions of this act or was not authorized by it, it would be void, because he would have no authority to make it, and of course, any order made by him must be made in accordance with and in pursuance of the authority given him by the act of August, 1916, or by this act, and any order made outside of the authority conferred by those acts would be absolutely void."

At 3496, the following exchange of views took place:

> Mr. OSBORNE: "I call the attention of the gentleman from Tennessee to the explanation in the statement of the managers of section 15, page 11. That explanation is as follows:
>
> " 'The substitute section also provides that this act shall not be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to the lawful police regulations of the states—'
>
> "And so forth, leaving out the word 'taxation,' which appears in the section. Was that intended?"
>
> Mr. SIMS: "The act plainly exempts the states from any kind of control with reference to taxation. The other language that the gentleman refers to simply has reference to the police powers of the states."

Mr. Esch, also a member of the conference committee, speaking at 3499, said, as to the power of the President generally, and as to this section:

"With reference to the provision that was referred to here as to 'any order of the President,' I think that has been explained. We must interpret those words in the light of the section in which the words appear; and if so interpreted they will not give to the President this broad and unlimited power to repeal or suspend any statute of the United States or any statute of a state.

"*With reference to section 15, relating to the taxing power, we have practically gotten back to the house provision.*"

Thereupon (March 14, p. 3500), the conference report was agreed to.

(h) Use by Congress of "police regulation" includes "rate regulation."

We find then that there was the same general diversity of view of just what the net result of the various provisions of the bill might be but we think the phrasing of the amended bill as it first passed the House, conclusively sets at rest any doubt there may be as to the sense in which the term "police regulations" was used by Congress in both of the acts in question. *It was used in the sense of regulation of rates;* and the inference is that having omitted the phrase from both the Railroad Control Bill and the Wire Control Bill, it was expressly intended not to except the regulation of rates by the states from the terms of the proviso. We submit, in other words, that Congress understood and intended to use the words "police regulation" in these enactments, however they may have been intended in other enactments, in exactly the same sense as the Supreme

Court of the United States used those words. In the sense, for instance, in which they are applied in *Reagan v. Mercantile Trust Co.*, 154 U. S. at p. 417, where language substantially parellel to the proviso is used: "We are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the state, subject to the control of the State, in all matters of taxation, *rates and other police regulations.*"

Congress contemplated, to use the language of this court in the recent case of *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 372, "rate regulation by a state in the exercise of its police power."

(i) Right to consult amendment in construing act.

So that, we think that this consideration alone disposes of all need of inquiry as to the meaning of "police regulations." It is a final demonstration that rate regulation is included within the power of police regulation preserved. That this amendment may be consulted to determine what Congress meant in the Railroad Act, and hence in the Wire Act, is, of course, obvious.

Sutherland, *Stat. Const.*, 470, p. 880.

"Amendments made, or proposed and defeated, may also throw light on the construction of the act as finally passed, and may properly be taken into consideration."

IV

PROVISIONS GIVING INTERSTATE COMMERCE COMMISSION POWER TO FIX TELEPHONE RATES NOT REPEALED; CONSEQUENTLY IT STILL RETAINS POWER, AND POSTMASTER GENERAL DOES NOT POSSESS IT, EITHER AS TO INTERSTATE OR INTRASTATE RATES.

1. Repeals by implication not favored.

The proper angle of approach to be assumed by the court in determining whether or not the so-called wire act has operated to suspend or repeal pro tanto the provisions of the statutes found under Title LVI A, entitled, "Regulation of common carriers of interstate and foreign commerce," is sufficiently illustrated in Black on Interpreation of Laws, Sec. 107, p. 351:

> "Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on the subject."

Numerous decisions of the Supreme Court of the United States fortify and sustain the rule.

Washington v. Miller, 235 U. S. 422, at 428:

> "In these circumstances we think there was no implied repeal, and for these reasons: First, such

repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (*United States v. Healey*, 160 U. S. 136, 146; *United States v. Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend v. Little*, 109 U. S. 504, 512; *Ex parte Crow Dog, Id.* 556, 570; *Rodgers v. United States*, 185 U. S. 83, 87–89;) and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

United States v. Barnes, 222 U. S. 513, at p. 520:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears."

Ex parte U. S., 226 U. S. 420;
U. S. v. Levois, 17 How. 85.

Also see note, Book XX (L. ed.) Sup. Ct. Rep. "The repeal by implication of a statute is not favored by the court."

2. Commerce act gives Interstate Commerce Commission power to regulate rates; makes unreasonable rates unlawful.

Turning then to Title LVI A, Secs. 8563–8604, U. S. Compiled Statutes, Compact Edition, we find that by express proviso—

"The provisions of this Act shall apply to any corporation or any person or persons * * * *and to telegraph, telephone, and cable companies* (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act. * * * * Provided, however, That the provisions of this Act shall not apply, * * * *nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State* and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

"* * *

"(3) All charges made for any service rendered * * * *and for the transmission of messages by telegraph, telephone, or cable,* as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 8574 provides:

"Any common carrier subject to the provisions of this Act, * * * any director or officer thereof, or any receiver, trustee, *lessee*, agent, or *person acting for* * * * such corporation, who, * * * shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared

to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense."

3. Commerce act and resolution in pari materia; must be harmonized.

Such was the law as it stood at the time of the enactment of the joint resolution, now appearing as sec. 3115¾x, which has already been printed in full. Reading these two sections together, certainly as a matter of first impression, there is absolutely nothing inconsistent between them, nothing whatever in the latter act even to suggest an implied intention to repeal the former. But the rule, as we have seen, is that if such implication might arise, it will not be favored under the law, and will not be held effective if there is any possibility of reconciling the two statutes. They are clearly in pari materia, and must be construed, if possible, so as to harmonize.

Black on Interpretation of Laws, 331, sec. 104:

> "Statutes in pari materia are to be construed together; each legislative act is to be interpreted with reference to other acts relating to the same matter or subject."

Black, 345, sec. 105:

> "Every statute should receive such a construction as will make it harmonize with the preexisting body of law. Antagonism between the act to be

interpreted and the previous laws, whether statutory or unwritten, is to be avoided, unless it was clearly the intention of the legislature that such antagonism should arise."

4. Commerce commission retains power to fix rates.

Clearly, then, the interstate commerce act is not to be deemed repealed, and is to be read in connection with the wire control act, and we find the two acts existing side by side in the most recent revision of the federal statutes. We find that it is stated expressly that the provisions of the act apply to telegraph, telephone, and cable companies doing an interstate business; that every unjust and unreasonable charge for their services is prohibited and declared unlawful, under penalty reaching a possible maximum of five thousand dollars. The conclusion that no change was intended is confirmed by the revision of the act to regulate commerce, as published by the Interstate Commerce Commission, from which we see that express provision is made (40 Stat. L. 272, p. 10 of Act in pamphlet form):

"That during the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise."

And as we have seen in another connection, section 10 of the Federal Control Act expressly provides:

> "The President may initiate rates, fares, charges, classifications, regulations, and practices, by filing the same with the Interstate Commerce Commission."

So we see that, in the case of the railroad control act, express provision was made therein for correlating and adjusting it to the terms of the interstate commerce commission act, and that act itself was in turn modified so as to recognize the right of the President, during the continuance of the war, to designate certain priorities. The inference seems irresistible that Congress, in dealing with two related matters, and passing an act in July with express reference to the terms of a similar act passed in March, having expressly modified the law in connection with railroads, and having said nothing with reference to telephones and telegraphs, intended to leave the jurisdiction of the Interstate Commerce Commission just exactly where it found it. If it was contemplated that the Postmaster General should fix rates at all, we would hardly have a proviso declaring any but a reasonable rate unlawful, under specific penalty. The claim to the unrestrained, uncontrollable power to fix all rates at such point as he sees fit can not be reconciled with the specific statutory declaration that such charges "shall be just and reasonable; and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." This is not a mere restraint on the making of such charges by the employees of the company, but it prohibits in the broadest terms

the making of such charges at all. Can it be that the Postmaster General is given the *implied* power to do something which is expressly forbidden to be done, under penalty of $5,000 fine? The statement that we can spell out of the two statutes—one of which construed most favorably still permits of the construction that the power claimed is denied, and the other which specifically forbids its exercise—a power to do the thing not granted in the one statute and made a criminal act in the other, is carrying the doctrine of implied repeal, never favorably regarded, into an ultrahostile atmosphere. There is no escape, then, from the proposition that the control of the Interstate Commerce Commission has not in any way been altered or changed.

Is it not equally apparent that if the Postmaster General has any power to make rates, he has power to make all rates; that if it clearly appears that the law did not contemplate that he should make interstate rates (as to which it may be observed there would be far greater reason for conferring the power), then very clearly he has no power to initiate intrastate rates. Such power as he has is either all inclusive, or nonexistent; and having found that he is expressly prohibited under penalty from regulating interstate rates, it naturally follows that he has no power to regulate rates at all.

Should it be urged, notwithstanding, that he has such power to fix rates, then, there being nothing inconsistent in such provision, and the statute being, as we have seen, in pari materia, the court must hold that the provision of the Interstate Commerce Act as

to interstate telephone rates that the same shall "be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful," remains intact and unabridged. Very clearly, it was never contemplated that interstate rates should be reaonable, and that intrastate rates may be fixed arbitrarily, and hence be unreasonable.

There might have been some reason to grant the power over interstate rates; in fact, if a federal agency were to exercise such power, that would be the normal sphere for its activity. This will certainly be the first instance where such agancy had power over the domestic concerns of a state, and none outside. Such an anomaly is unthinkable.

V

THE JOINT RESOLUTION AND PRESIDENTIAL PROCLAMATION CANNOT BE CONSTRUED AS CONTENDED BY THE GOVERNMENT AND TELEPHONE COMPANIES, BECAUSE SUCH CONSTRUCTION WOULD RENDER THE RESOLUTION VOID, BY REASON OF CONFLICT WITH THE FIFTH AMENDMENT AND THE TENTH AMENDMENT OF THE FEDERAL CONSTITUTION, AND WOULD VIOLATE THE RULE AGAINST THE DELEGATION OF LEGISLATIVE POWER.

We conclude, then, that the decision of the present case involves nothing more nor less than an examination and interpretation of the joint resolution of Congress and the Presidential proclamation thereunder,

in the light of settled constitutional principles, and guided by the ordinary rule of statutory construction. We believe that the court will be convinced that the plain reading of the statute, construed in the light of all the circumstances surrounding its enactment and the purpose it was intended to serve, together with its practical construction since, will leave neither shred nor suggestion of foundation on which to ground the conclusion that Congress intended to authorize either the Postmaster General or the President to fix the rates of the telephone and telegraph.

The Supreme Court of South Dakota, in its opinion below, well said (171 N. W. 278):

> "If by that proviso Congress intended to deprive the states of the power to regulate rates for intrastate messages, then, but not until then, we would have to consider the power and authority of Congress so to do."

We do not think that this court will need to reach this question at all.

Merely as one of the considerations confirming that interpretation, we submit that to construe the act as written, as one conferring upon the Postmaster General the arbitrary power that he claims, would render it unconstitutional. Our position is, in other words, that Congress passed a perfectly valid enactment; that the Postmaster General is seeking to put upon it a construction that would render it unconstitutional. The considerations next submitted, therefore, are pursuant to the familiar principle that, if the plain meaning of the language as written permits a construction which will not run counter to constitutional prohibi-

tion, the court should adopt such construction, and thus sustain the validity of the enactment.

U. S. v. Delaware & Hudson Co., 213 U. S. 366, 407–408;
Knights Templars Indemnity Co. v. Jarman, 187 U. S. 197, 205.

The Supreme Court of South Dakota in its opinion also said (171 N. W. 277, at 278:

> "Much has been said in the brief about the war powers of Congress and of the President, but we are of the opinion that those questions are beside the issues of this case."

The theory of the defense is that Congress has under the constitution power to make all laws necessary and proper for carrying into execution the powers by that instrument vested in the Govrnment. It is argued that Congress is given the power to make war; that this connotes the power to make all laws necessary and proper for carrying into execution the power of making war. This, of course, is true, subject, however, to the one fundamental, continuing, undeviating condition and qualification recognized in *McCulloc v. Maryland*, 4 Wheat, 316, and consistently adhered to in every case construing this clause of the constitution, down to the present time. Wherever the broad rule of power to enact all necessary and proper legislation has been asserted, it has been coupled with the limitation first expressed by Justice Marshall, that the means must be such as "are not prohibited, but consist with the letter and spirit of the constitution."

This language is quoted and reaffirmed in the *Legal Tender Cases*, 12 Wall. 457, at p. 539, and the

court indicated at the foot of the same page that it would hold the legal tender acts unconstitutional if "they were prohibited."

Legal Tender Cases, 110 U. S. 421. After quoting from *McCulloch v. Maryland*, the court said, at page 441:

> "The rule of interpretation thus laid down has been constantly adhered to and acted on by this court, and was accepted as expressing the true test by all the judges who took part in the former discussions of the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts."

Logan v. United States, 144 U. S. 263, quotes again and states:

> "Congress may use any means * * * consistent with the letter and spirit of the constitution."

Boske v. Comingore, 177 U. S. 459, reaffirms the test that the power is to pass laws "which are not prohibited, but consist with the letter and spirit of the Constitution."

These words are repeated in the following cases:

Flint v. Stone Tracy Co., 220 U. S. 107, at 176.

Kansas v. Colorado, 206 U. S. 46, at 88, and the court adds: "a statement which has become the settled rule of construction."

United States v. Hoke, 187 Fed. 992, at 994.

And in *Stewart v. Kahn*, 11 Wall. 493, much relied on "the act is within the canons of construction laid down by Chief Justice Marshall."

United States v. Casey, 247 Fed. 362, contains at page 366 the same significant quotation, so that

from first to last, the war power and its exericse must "consist with the letter and spirit of the constitution."

As to the meaning of war power, *Miller v. United States*, 11 Wall. 268, contains to our mind a comprehensive and exact definition of just what is meant by "war power." Construing the so-called confiscation acts of August 6, 1861 and July 17, 1862 as constitutional, the court used this language in pointing out the true distinction between what it understood as the meaning of war power and municipal or sovereign power. It said at page 304:

> "If the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, *they are an exercise of the war powers of the government*, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed."

Now then, as to the character of this war power upon which no restriction is imposed, we find it stated, at page 306:

> "The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it fur-

nishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation."

And at p. 307, the court says:

"We come, then, directly to the question whether the act of 1861, and the fifth, sixth, and seventh sections of the act of 1862 were an exercise of this war power, the power of confiscation, or whether they must be regarded as mere municipal regulations for the punishment of crime."

And at p. 309:

"The purpose avowed then was legitimate, such as Congress, in the situation of the country, might constitutionally entertain, and the provisions made to carry out the purpose, viz., confiscation, were legitimate, *unless applied to others than enemies.*"

And then at p. 310:

"It has been argued, however, that the provisions of the act for confiscation are not confined in their operation to the property of enemies, but that they are applicable to the property of persons not enemies within the laws of nations. If by this is meant that they direct the seizure and confiscation of property not confiscable under the laws of war, we cannot yield to it our assent. *It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies.*"

Salamandra Ins. Co. v. New York Life Ins. Trust Co. 254 Fed. 852.

These citations seem superfluous, for the constitution itself declares "this constitution and the laws of the United States which shall be made *in pursuance thereof* * * * shall be the supreme law of the land." Neither in peace nor in war is aught the law of the land not enacted pursuant to the constitution. It is indeed a "fighting constitution" and no mere "imposing spectacle of impotency." Truly, "the power to wage war is the power to wage war successfully." But the constitution has determined what power is necessary in waging war successfully, and the power to nullify the constitution is not a necessary power in making war. Counsel and possibly some courts emphasizing the plenary character of the war power have failed to bear in mind that it is not what a particular Congress or a particular court may think is necessary in waging war successfully or what the exigencies of a particular lawsuit may require that determines the scope of the war power. The constitution asserts its scope and sets its limit because it arises out of and under the constitution. While that instrument does not contemplate national helplessness, neither does it contemplate its own destruction. It nowhere authorizes its own violation. Instances of unpermitted possibilities might be multiplied. Congress could not constitutionally create the President dictator for the period of the war. No more could it formally vote to invest him with complete legislative and judicial power, no matter how desirable some might think it that this be done. Nor could the President be authorized by Congress purely in his civil capacity and entirely apart from a declaration of martial law to supersede the existing civil

governments of the states, on the theory that the necessities of war required that they should be so displaced, because the continuance of state administration was unduly cumbrous and a burden upon the natural, harmonious, and logical development of the national resources in the interest of the national security and defense. Neither could Congress as a war measure divest all the courts of a state of civil jurisdiction and disband the public utility commissions for the period of the war, upon the theory that jurors, judges, and commissioners might better spend their time in the fields with hoe and spade, stimulating and speeding up production, and upon that exclusive ground, turn over the performance of their functions to some national instrumentality designated by Congress or to be designated by the President.

Congress could no more authorize the Postmaster General to raise revenue with which to carry on a war by arbitrarily increasing the telephone rates for that purpose, than it could authorize him to go out and seize private property of citizens generally, in order to realize revenue for war purposes. The impairment of property rights would be wholly analogous in either case.

The Constitution has determined by the fifth amendment the taking of private property by civil agencies is not necessary to the waging of war successfully.

McCray v. United States, 195 U. S. 27, at p. 61:

> "Undoubtedly both the fifth and tenth amendments qualify, in so far as they are applicable, all the provisions of the constitution."

If the federal government has the right to take over the telephone and give to the Postmaster General the arbitrary power to fix rates, and inferentially the power to exclude all users of the telephone other than governmental employes, and exclude all messages except government messages, without compensation to the private user, then on principle there would be nothing to prevent the government, for instance, in connection with Camp Grant at Rockford, to commandeer all the public utilities of the city, to the exclusion of citizens and users. An exact parallel in principle would exist had the government, by general legislation in like terms, authorized the President or the Secretary of War, when in his judgment it was necessary, to take existing water works, existing gas plants, existing light plants, and cause the same to minister solely to the comfort and the needs of the army. We would then have the anomalous situation under which, without legal proceeding of any kind, without compensation, without notice, and without hearing, the inhabitants of an entire city could be left without water, light, or fuel for cooking and yet neither Congress nor president nor military commander apart from extreme military necessity whose existence is always a fact for judicial ascertainment could commandeer so much as a ton of coal or can of kerosene from any individual citizen without due process and without just compensation.

To construe the act as permitting the Postmaster General to do what he has done and what the pleadings claim for him the right to do, would necessitate a holding that the act was unconstitutional, *first*, be-

cause it would violate the fifth amendment, which restrains the taking of property without due process of law and without just compensation; *second*, it would violate the tenth amendment, by reason of trenching or seeking to trench upon those powers which are reserved to the separate states; *third*, it would violate the fundamental rule that Congress cannot delegate legislative or arbitrary power.

1. As contrary to the fifth amendment.

That portion of the amendment involved reads:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

We need not spend time on the proposition that Congress did not have in mind making compensation to the *users* of the telephone, the telegraph, or the railroad for such deprivation of property rights as they might suffer through federal control. The provision for just compensation was clearly intended to apply to the owners of those utilities, not to anyone else. A moment's consideration of the remedial scheme embodied in the act reveals the patent absurdity of striving for a construction that it was intended to confer rights on the user of the telephone. Assuming that a reasonable rate was $1.50 per month—which prevails for residences in our community—and that the Postmaster General saw fit to increase the rate to $2.00 per month, it assuredly

was not intended that the user should enter into negotiations with the President or his representative, the Postmaster General, as to the rightfulness of such charge; and if he should succeed in convincing him that he had been overcharged in part, that the Postmaster General or President should return 75% of the overcharge to the user and relegate him to his remedy by action in the court of claims at Washington for the balance so wrongfully extorted from him.

Laying out of account the consideration that such a remedy for a minor wrong in a tribunal far removed from his domicile would be so burdensome in practical application as to amount to an absolute denial of the right; or that if available at all it would foster litigation to an extent such as no other legislation could do, unless it were a parallel act conferring the right to litigate the reasonableness of the price of every postage stamp in the court of claims, is it not apparent that the net effect of such a rigamarole would merely amount to a very laborious, cumbersome, antiquated process enabling the citizen, in a roundabout, poorly articulated sort of fashion, to arrive at a reasonable rate after interminable vexation? Clearly the amount exacted above a reasonable rate would be the measure of his deprivation and the extent of his right of recovery. That no such remedy or procedure could conceivably have been contemplated is further emphasized by the suggestion embodied in the concurring opinion of Mr. Justice Miller, in *Railroad Co. v. Minnesota, infra*, at p. 460, laying down the rule—

"that the proper, if not the only, mode of judicial relief" against rates "is by a bill in chancery asserting its unreasonable character * * *.

"That until this is done it is not competent for each individual having dealings with the carrying corporation * * * to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method,"

a rule which was subsequently adopted and confirmed in *In re Engelhard*, 231 U. S. 646. See head note 3, and see p. 651. If Congress intended to give the Postmaster General the power to fix rates, and at the same time preserve to the citizen the right to service at a reasonable rate, it would have preserved the right of review through the Interstate Commerce Commission, or some simpler and more expeditious agency.

We must assume, then, that if this act confers the rate making power, it confers an arbitrary power. The validity of the act is to be tested on the theory that the defense asserts. Conceding all that defendants claim—that the power the resolution granted is the power which the Postmaster General seeks to exercise, we are in the identical situation of this court in *Chicago, Mil. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418. It said, at p. 456:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be reexamined here as to its propriety or accuracy. The Supreme Court authoritively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed

out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable."

Substituting Postmaster General for Commission this is our case. The court continued:

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

The converse of this proposition is our position in a nutshell:

> "It deprives the" citizen of his "right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of" the Postmaster General, who, "in view of the" language of the act, "cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

It was dealing with the deprivation of the carrier or utility of property or property rights in violation of the 14th amendment. We lay claim to protection for the reciprocal and correlative property right of the user of the telephone under the 5th amendment. We say that if the enforcement of a rate unreasonably low takes the utility's property without due process of law under the 14th amendment, the extortion of a rate unreasonably high amounts to a deprivation of the citizen's right of property under the 5th amendment. We contend that one of these propositions is the inevitable corollary of the other. That if the States cannot take the carrier's right without due process, Congress cannot impair the right of the citizen in disregard of due process.

We are not primarily concerned with the reasonableness or the results of the rates now fixed. We are challenging, not the policy of the Postmaster General in the instant case, but his power to act at all.

The proposition is that once the arbitrary power contended for be conceded; that if the Postmaster

General can fix the rates as he pleases, then he can make them so high as to be prohibitive. Necessarily, what he can do indirectly, he can do directly. If there is no supervision or control as to the reasonableness of rates, there can be none as to the adequacy of service. Clearly, if service can be abridged at his mere whim or caprice, it may be denied *in toto*, and that without relation to war or the demands of war, as the Kansas court said, *In re Gardner*, 84 Kan. 264, 113 Pac. 1054, 33 L. R. A. (N. S.) 956, dealing with a deprivation of utility property contrary to the 14th amendment by arbitrary rate, "so far as the principle involved is concerned, (it) might be 1 cent per hundred miles, or nothing at all." If the principle is sound, the Postmaster General may by his arbitrary fiat, by one stroke of the pen as it were, absolutely without notice, without hearing, or opportunity to be heard, without regard to "due process" or "the law of the land," wipe out the right to use the telephone at all.

(a) The nature of the right to the use of a public utility.

What is the character of the right of the consumer, the user, the taker, in general of the public—whatever the name or designation employed—in relation to the large variety of public utilities, whether it be water companies, gas and light companies, common carriers, telephone or telegraphs? Does not each individual receive the pro tanto right to the use of the property of the utility? Hence, is it not a property right?

The citizen who arises in the morning turns on the current of electricity, making to that extent use of the property of the electric company; he turns the water faucet, making in like manner use of the mains and pipes and pumping facilities of the water company; his breakfast is prepared by heat supplied through the mains of the gas company, and pro tanto he uses the property of the gas company from its generator all the way through the distributing system that brings it to his premises. Upon tender of fare at a reasonable rate, he makes pro tanto use of the street railway system, being entitled as of absolute right to the possession and occupancy of that portion of the property necessary for his ride, and directly utilizing the facility from power plant to the seat that he occupies. Substantially all of the food that goes into his mouth, all of the garments that clothe him, are transported over the common carriers, and for that purpose temporary use is made of the transportation system, the rails, the cars, and all that go with it, of the country.

Is this use any different in quality, kind, or character, because the distributing agencies have brought it nearer to the door of the citizen—and made it more available for his use? Can it make any difference, for instance, that instead of being an undivided owner of a well, or being entitled to the use of the town pump, he receives his water from the faucet instead of at a well? That, instead of having entered into a formal contract of rental by which he has the right to go upon the premises of the gas company and set in motion the generating apparatus and carry away with him in appropriate receptacle the

commodity manufactured; or a specific, definite, individual lease of the rolling stock of the street railway or steam carrier that entitles him to propel his individual vehicle and use the real estate of the carrier, the right is raised in his behalf by implication of law entitling him upon the tender of payment for any of the facilities in question to their use? Does the fact that all of these facilities have been modernized and are not the subject of previously arranged lease or purchase, change their character in any way? Is not the right to use property, real or personal, whether dependent upon title deed, lease, or raised by implication of law, in favor of every citizen prepared to tender the price a property right? Its very essence, quality, and character is the right to use property.

The development of one right is typical of all.

> 16 *Cyc.* 620. "Every tenant for life is entitled of common right to take reasonable estovers. * * * In taking wood for fuel he is entitled to take a reasonable quantity. * * * He has no right to *sell* any of the firewood * * *."

Where wells on lands containing oil or gas are already opened, he may continue to work them. *Id.* 625.

These, without question, are property rights falling within the protection of the constitutional provision, restraining deprivation without due process of law. If the right to go into the wood and gather up the fagots, transport them homeward, and utilize them for fuel, or if the right to go upon the property and of his own labor construct facilities for trans-

porting gas to his domicile for use as fuel, are property rights, is this modernized right of estovers, under which the citizen as of right may for a reasonable price have the fuel transmitted to his kitchen at the expense of the owner—more valuable in character, more essential in modern life—a property right of less dignity, character, and standing than the ancient permission to journey to the wood lot?

Is the citizen's right to the use and enjoyment of the agencies of civilization protected only while such agencies are primitive in character?

The right to use the telephone is possibly the very clearest illustration of the quality and character of the right of property inherent in and involved in the enjoyment and use of a public utility, because, at least so far as the practice in this vicinity is concerned we have here the continuing right to the possession and use of a specific, individualized, definite, tangible piece of property that is set apart from the mass of the company's property and segregated to the use of the individual. The telephone receiver and transmitter, when once installed upon the premises of the taker, cannot be removed. The user has the absolute continuing right to retain it so long as he makes payment. As stated in Jones, *Telegraph & Telephone Companies*, sec. 258:

> "It is the duty of telephone companies to furnish equal facilities and conveniences, impartially to all, irrespective of age, race or habits, and serve all these alike on offering to comply with their reasonable regulations."

Again, in sec. 249, p 339:

> "In the case of telephone companies, each person has the right to demand and receive a telephone

and telephonic connections, facilities and services, and the best in use by such companies. Not only is it necessary that these companies should furnish the best facilities which they may have in use, but they must furnish the very best equipped and most up-to-date instruments to be used by any similar companies."

Does not the very first and fundamental declaration of the Supreme Court of the United States recognize that the right, whose existence is or may be abridged by the postmaster general, is a property right?

(b) Property rights under terms *Munn v. Ill.* Cases cited.

The very cornerstone of the doctrine of regulation is as quoted in *Munn v. Illinois*, 94 U. S. 113:

" 'When private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable.' "

Again, quoting from the opinion of Le Blanc, J. in *Aldnutt v. Inglis*, 12 East 527, we find the statement, at page 128:

" 'The question is, whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them.' "

Again, at page 133 of *Munn v. Illinois*, it was said:

"There is no attempt to compel these owners to grant the public an *interest* in their property."

And on the same page:

"If they did not wish to submit themselves to such interference, they should not have *clothed the public with an interest in their concerns.*"

At 134:

"Rights of property which have been created by the common law cannot be taken away without due process."

And again:

"To limit the rate of charge for services rendered in a public employment, or *for the use of property in which the public has an interest,* is only changing a regulation which existed before."

Does not this very paragraph embody all the law necessary upon the subject? It is dealing with the matter, of course, from an entirely different angle, but can it be doubted that "the use of property in which the public has an interest" by the public, is the exercise of a property right, or right of property, falling within the scope of the other sentence in the paragraph which says:

"Rights of property * * * cannot be taken away without due process."

Smyth v. Ames, 169 U. S. 466, 547:

"*What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.*"

Covington & Lexington T. R. Co. v. Sanford, 164 U. S. 578, 596–597:

" 'In prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * So that the right of the public to use the denfendant's turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable.' "

Foundations of Legal Liability (Street), p. 7:

"It is to be observed that the terms 'right' and 'duty' are substantial correlatives. They are, in fact, only different names for different aspects of that legal obligation (*vinculum juris*), by which men are held in jural relations. The term 'duty' is the name applied to the legal tie when it is viewed from the standpoint of the person who is bound to do; while the term 'right' is used when the same tie is viewed from the standpoint of the person entitled to performance."

(c) The right to receive the service of a public utility at a reasonable rate, as coming within the due process clause.

Telegraph and telephone companies must serve all impartially; must have sufficient facilities; must give service at reasonable rates. See Jones, Telegraph & Telephone Companies, secs. 248, 249, and 254.

This being the case, it follows, under the principle above stated, that the citizen has the correlative right to receive impartial service, sufficient facilities, and at reasonable rates, and, as a necessary corollary, must have the right to preservation of all machinery necessary for the determination of the reasonableness of the rate, the sufficiency of the facilities, and the impartiality of the service.

Bailey v. P. W. & B. R. R. Co., 44 Am. Dec. 602:

"A vested right is defined by Judge Duncan, in *Eakin v. Raub*, 12 Serg. & R. 359, 'as the power one has to do certain actions, or to possess certain things, according to the laws of the land.' "

Due Process of Law, McGehee, pp. 142–143:

"The rights which are thus within the protection of due process of law have been called 'vested rights,' and a vested right has been defined as a right vested in a citizen 'to do certain actions or to possess certain things according to the law of the land.' Approached from another point of view, a vested right is one which is complete and consummated, so that nothing remains to be done to fix the right of the individual to enjoy it."

Railroad Rate Regulation, Beale & Wyman, p. 103:

"We will not be content in our times with the sort of equity which the Chancellor originally evolved from his inner consciousness to deal with each case as it came before him. Still less will any people with the traditions of our race rest under proceedings of the order of the Star Chamber without being confronted with testimony against them. These decisions mean that as a people we will not be content to have our rights determined by administrative fiat; we demand reasoned judgment

based upon ascertained principles generally understood."

Story on the Constitution, 5th ed., 1950:

"It should be observed of the terms, 'life,' 'liberty,' and 'property,' that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law."

"(Liberty) The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right."

Ekern v. McGovern, 154 Wis. 157, at pp. 254-255:

"Now in contemplation of the industry thus exercised to afford protection to the individual from injustice of any sort, can it be possible it was thought the terms 'liberty' and 'property' would not include more than freedom from unjust physical restriction and things subject to be bought and sold, or stop short of freedom for one to possess anything and to enjoy it as property, if valuable in any sense, which may lawfully administer to his reputable desires and happiness? Why stop with tangible things—things subject to transfer and measurement accurately in money? If a thing has a pecuniary value or a real value to its possessor, it seems it has a property element in the constitutional sense and freedom to enjoy it is liberty in a broad sense. * * * The framers of the constitution did not intend any narrow conception of the terms 'liberty' and 'property.' They intended, as all history shows, directly and circumstantially, to include everything valuable to the individual as regards the dominant right to the pursuit of happiness."

And as to the right of use in a public utility we add the words of

Bennett v. Twin Falls North Side Land & Water Co., 150 Pac. 336, at 339:

"When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor. *Fisher v. Bountiful City*, 21 Utah, 29, 59 Pac. 520; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81."

As we have seen, no claim can or will be made that the wire and rail acts, respectively, intended to do more than to take from the rail and wire companies, respectively, the supervision, operation, possession, and control of their properties. They were the parties in the contemplation of Congress, and they are the "persons" with whom, in practical effect, the postmaster general has arranged for just compensation. Our proposition is that when Congress took over the property and rights of the rail and wire companies, having made no provision to divest the rights of the private users, it took them just as they stood. In other words, the Government took only such property and such rights as these companies possessed, and took them subject to all of the outstanding duties and obligations of the companies, respectively. The point we make is that the companies no longer possessed the unqualified ownership of their property, and therefore, Congress and the President did not take the unqualified ownership or control of the systems in question.

As is well stated in *Spring Valley Water Co. v. City & County of San Francisco*, 165 Fed. 667, at 676, in discussing the status of a public utility:

"When a man parts with his property, it is no longer his. When he devotes it to the public use,

it ceases to be private property." Citing *Munn v. Illinois.*

Now then, what is the status of a public utility? Except for the incidents of the naked legal title, the right of legal possession, and the right to the revenues from operation, each and every public utility has in practical effect parted, to the fullest extent, with the entire beneficial use of its property. The situation is analogous in character, and identical in principle with one that would prevail, if the telephone company were free to do so, and, standing as a principal on one side, had entered into a contract with the public, organized into an association of users on the other, by the terms of which the entire use of the property was granted by the utility to the public association. The mere fact that the public is not so organized and has not entered into such formal contract, and that the obligation of the utility is raised by implication of law, does not alter or affect the situation. The residuum of interest, use, and control in the public utility is no greater in extent than it would be if such formal organization and contracts were existent. Here is a situation where the Government is taking over the property, subject to existing rights and liabilities, different in kind but subject to the same protection of law as if they were evidenced by formal lease, subject to the same protection as the interest of a mortgagee would be, neither of which could be terminated or divested, except through the due and orderly process of law and upon just compensation.

The case of *Rossmiller v. State*, 114 Wis. 169, supports this proposition. That case concerned the

right of the legislature of Wisconsin to license the cutting of ice from the meandered lakes of the state. The language employed at pages 187–188 in the discussion of the matter, with the transposition of a word or two, embodies our conception of the situation here. The title of the public utility to its property is quite analogous to the title which the state has to the bed of the lake. Substituting "Utility" for "bed of the lake," as found at page 187, and "owner" for the "state," we have:

> "The title to the" utility " is in the" owner, "but not for its own use as an entity. The mere naked legal title rests in the" owner, "but the whole beneficial use thereof * * * is vested in the people of the state as a class."

And again, at page 188:

> "Since the whole beneficial use of" *the utility* "is unchangeably vested in the people, every one within the state having the right to enjoy the same so long as he does not invade the like right of another, without any interference by claim of paramount right to the subject thereof, any law invading that invidual possession is, in effect, an invasion of the right to liberty and property without due process of law, contrary to said fourteenth amendment."

And inserting the words in italics in the concluding sentence of the paragraph, we have:

> "Any such invasion for the purpose of adding to the public revenues, exacting from a person, for the benefit of the state, compensation for the enjoyment of a right which belongs to him and which he has a right to enjoy without paying therefor" *more than the reasonable value thereof*, "violates sec-

13, art. I, of the state constitution, prohibiting the taking of private property for public use without just compensation."

Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, recognizes inferentially at least, we think, the soundness of the proposition that the exaction of other than a reasonable rate from a consumer constitutes a taking of property without due process, because stress is there placed on the fact that the rate ordered was a reasonable rate.

To the same effect is *Aquino v. Riegelman*, 171 N. Y. S. 716, at 718:

> "I deny that the Legislature has the power, either by direct action or otherwise, to give or grant to any person rights which are the property of all the citizens of this commonwealth, and which the Legislature holds in trust for the common use and does not hold in its own right or as proprietor. I deny any power in any board or commission to sell and grant to any person, natural or artificial, such rights and properties as are held in trust for the common benefit of all the citizens of the state, and I assert that such rights are inalienable."

That the right of use of commons is within the protection of the due process clause is sanctioned by *Land Commissioner of Kaskaskia v. Kaskaskia*, 94 N. E. 970.

We therefore assert, as an incontrovertible proposition, that all that the Government did receive or could receive from the utilities was what the public utilities had—simply that, no more and no less.

A different situation might have arisen, were the carriers and the telephone of governmental creation

or construction in the first instance. Then, perhaps, on the theory that they were strictly governmental agencies, discharging a purely governmental function, it might possibly be held that the Government had the right to extend the use and privileges of its governmental apparatus on such terms, to such extent, and in such manner as it saw fit, or to withhold it altogether, although we think it does not necessarily follow, that, because operated by agents of the Government, the utility would be discharging a governmental function. Here we open an interesting line of inquiry as to the position the Government will occupy in the socialization of economic instrumentalities that now appears imminent. Possibly no more important question will need to be determined in the years immediately ahead than this very question of the position of the Government, state or national, when it enters the realm now occupied by public utilities and embarks upon the policy of government ownership. It is our conjecture that the courts must logically follow the line already marked out in the case of municipal corporations, and hold that both state and national governments when they enter upon the conduct of a business, are discharging the functions, not of a government, but of a proprietor. And that they will be held subject to the manifold liabilities to which municipalities have been subjected in their proprietary capacity, including the duty to give reasonable service at reasonable rates.

But we are not concerned with the settlement of that issue now.

For possibly the strongest and most decisive cases that can be found to sustain the contention here made is that of *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. It is especially interesting and significant that this case was concerned with the exercise of administrative or governmental functions on the part of the postmaster general, while here, we think at least, there is room for the contention that he is representing the Government purely in a proprietary or business capacity. It was there said, at p. 108:

> "That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

And then at 109, in language that could not be more clearly or decisively applicable to the present situation if the court had written it with the pleadings in these very cases before it, it is said:

> "The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power

in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

This case will be cited in other connections. For the present, the point we desire to emphasize is that, while the fifth amendment is not mentioned in express terms, it is specifically stated that the postmaster general violates the property rights of the persons whose letters are withheld, the prevention of which violation, of course, is referable to the fifth amendment.

Is it not perfectly clear that if the arbitrary and unauthorized withholding of written communication constitutes a violation of property rights, the arbitrary and unauthorized withholding of oral communication constitutes a like violation of property rights? It is not interference with property in the possession of the particular piece of paper, or in the particular tracings of ink that constitutes the essence of the violation; it is the prevention of the receipt of the communication contained in the letter. It is true that the letters in question contained checks, drafts, moneyorders, and money itself, but in the paragraph quoted, there is nothing to indicate but what the same result would have followed from the mere withholding of the mail, even though there had been no money in the letters. It would be equally true in the case of many an organization, if, to para-

phrase the opinion, it were to be entirely cut off from all telephone facilities, its business would be greatly injured, if not wholly destroyed.

Even though the element of property involved were the money contained in the letters, at least as to the telegraph feature of the wire control bill, the same thing would obtain, because the transmission of money by telegraph has become a commonplace and it is easily conceivable that large sums of money may be transferred from the credit of one individual to that of another through the medium of the telephone. So that, had that been the test of the case, this element can readily be imported into the exercise of the power in question by the postmaster general, even as to the use of the telephone.

Fairfield Floral Co. v. Bradbury, 87 Fed. 415, at p. 417:

> "If I were free to follow my own judgment, I should say that congress, neither directly, nor through the postmaster general or any one else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States, at least without a trial."

We close the discussion with this prophetic judicial forecast of what the law must be, made by a Federal court.

Hoover v. McChesney, 81 Fed. 472, at 480:

> "If the United States government should hereafter become the owner of all the transportation lines in the United States, and thus the common carrier of the nation, and by law exclude all others from becoming common carriers, it would seem to follow inevitably that the citizens of the United

States would have a common right to travel and ship freight over the lines thus owned and operated by the United States, and that all of its citizens, subject to such general laws and regulations as to rates and the operation of the lines as might be enacted and established, would have this common right, and that such a right would be readily recognized as a property right in the citizen, and one of which a particular citizen could not be deprived except by due process of law. We think the right to the use of the mails, though in degree much less valuable than the use of the transportation lines, would be equally a property right, and one which could not be taken away except by due process of law."

And again, at 480:

"It is not to be overlooked that the establishment of the postal service and its operation is the exercise of a governmental function."

After quoting the definition of Webster in the *Dartmouth College Case*, 4 Wheat. 518, the court continues, at p. 481:

"* * * In the case of *Bank of Columbia v. Okely*, 4 Wheat. 235, as more comprehensive and more accurate. Justice Johnson says:

" 'As to the words from Magna Charta incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.'

"If we are correct in concluding that the use of the postal service of the United States by a citizen thereof is a right in the nature of a property right,

then it must follow that the order of the 17th of February, 1896, of the postmaster general, which finds complainant guilty of a violation of the postal laws, and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned, during his pleasure, is not due process of law within the constitutional meaning."

And in conclusion, at 485, uses language directly applicable and controlling in these cases:

"These cases, we think, are a distinct ruling that a bill of injunction is the proper remedy, if in law the authority exercised by the postmaster general is beyond his constitutional authority. Any other view than herein expressed would leave a citizen without remedy, and this perfect and magnificent postal system of the United States subject as to its use to the arbitrary will of the postmaster general. If he can decide finally, without court or jury or other legal trial, whether a business which is being carried on is within the statutory prohibition, and also that a certain citizen or citizens are engaged in that business, and, having thus decided, can prohibit absolutely by general order the use of the mails and postal service of the United States, not only in that business, but by such citizen or citizens, then, indeed, as to this use, are the citizens of the United States outside of the guaranties of the constitution."

2. As contrary to the tenth amendment.

(a) Police power reserved to the states.

If we may take it then as established that to uphold the constitutionality of the resolution requires a construction that the Government remains under

the continuing duty to render the public adequate service at reasonable rates, then we say that Congress has not the power, under the Constitution, to fix intrastate rates and therefore could not and did not delegate that power either to the President or to the postmaster general.

Art. X of the amendments to the federal constitution reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

That this amounts to the fullest reservation of the police power to the state has been frequently decided.

Black's *Constitutional Law*, Sec. 154:

> "The statement is frequently made that congress is not invested with the police power. It is true that congress has no general power to make police regulations for the people of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states, under the pretense of police regulations."

Civil Rights Cases, 109 U. S. 3, considers the power of Congress to pass a law conferring on all persons "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement," At p. 10:

> "Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amend-

ments." (Referring to the 13th, 14th, and 15th amendments.)

After discussing the 14th amendment, the court concludes:

"This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation."

Western Union Tel. Co. v. Pendleton, 95 Ind. 12:

"The police power is the right to regulate the enjoyment of property, to maintain public order, to secure the rights of citizenship, and to prevent injury to private rights. This power can not be exercised within state limits by the Congress of the nation." Citing cases.

"The power of enacting laws upon this subject resides solely and exclusively in the states and extends to all matters of personal and property rights within the states."

Upon appeal to the supreme court of the United States, the decision was reversed, on the ground that the Indiana law under consideration was in conflict with the power of Congress to regulate commerce, but the court we think, in express terms, recognized the principle we urge.

Western Union Tel. Co. v. Pendleton, 122 U. S. 347, at p. 359, it is said:

"The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the state does not thereby encroach upon the free exercise of *the power vested in Congress by the Constitution*. Within that limitation it may, undoubtedly, make all necessary provisions with

respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require."

City of New York v. Miln, 11 P. 102, 12 U. S. 357, at p. 139:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

Keller v. U. S., 213 U. S. 138, at pp. 144–145:

"In *Patterson v. Kentucky*, 97 U. S. 501, 503, is this declaration:

" 'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government.' Cooley, Const. Lim. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the States must

observe in its exercise, the existence of such a power in the States has been uniformly recognized in this court. *Gibbons v. Ogden*, 9 Wheat. 1; *License Cases*, 5 How. 504; *Gilman v. Philadelphia*, 3 Wall. 713; *Henderson v. Mayor of the City of New York*, 92 U. S. 259; *Railroad Company v. Husen*, 95 U. S. 465; *Beer Company v. Massachusetts*, 97 U. S. 25. It is embraced in what Mr. Chief Justice Marshall in *Gibbons v. Ogden*, calls that 'immense mass of legislation,' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control.'

"And in *Barbier v. Connolly*, 113 U. S. 27, 31, it is said:

" 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.' "

In re Pacific Railway Commission, 32 Fed. 241, at 245:

"Any legislation of congress beyond the limits of the powers delegated is an invasion of the rights reserved to the states or to the people, and is necessarily void."

Cook v. Marshall Co., 196 U. S. 261.
Plumley v. Massachusetts, 155 U. S. 461.
House v. Mayes, 219 U. S. 270:

"Such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with

the State—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good."

Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204, pp. 209–210.

Hammer v. Dagenhart, 247 U. S. 251, at 274:

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

"Police regulations relating to the internal trade and affairs of the States have been uniformly recognized as within such control. 'This,' said this court in *United States v. Dewitt*, 9 Wall. 41, 45, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.' See *Keller v. United States*, 213 U. S. 138, 144, 145, 146. Cooley's Constitutional Limitations, 7th ed., p. 11."

Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6:

"The police power of a state is as broad and plenary as its taxing power; and property within the state is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

(b) Especially is the police power preserved as to regulation of intrastate rates.

C. B. & Q. Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. Ed. 596:

"We hold that the police power of a state embraces regulations designed to promote the *public convenience and the general prosperity*, as well as

the regulations designed to promote the public health, the public morals, or the public safety."

Lake Shore & Michigan Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 703:

"Now it is evident that these cases (referring to the cases cited in the opinion) had no reference to the health, morals, or safety of the people of the state, but only to the public convenience. They recognize the fundamental principle that, outside of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a state, *that relate to its internal order or that involve the public convenience or the general good*, are primarily for the determination of the state, and that its legislative enactments relating to those subjects, and which are not inconsistent with the state Constitution, are to be respected and enforced in the courts of the Union, if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the national Constitution."

Arkansas Rate Cases, 187 Fed. 290. Subdiv. 6 at p. 297 contains a very exhaustive discussion of this proposition. The court said:

"The right of every sovereign state to regulate public service corporations and the rates to be charged by them, subject to the provisions of the fourteenth amendment prohibiting deprivation of one's property without due process of law and other provisions of the national Constitution, rests upon the police powers, which 'are nothing more or less than the powers of government inherent in every sovereignty.' License Cases, 5 How. 583, 12 L. Ed. 256; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 521, 18 Sup. Ct. 418, 42 L. Ed. 819."

The court then continues with a most exhaustive citation of authorities, for which reference is made to that opinion.

(c) Subject only to the one limitation that it must not impair the efficient exercise of federal function, the police power of the state has been repeatedly asserted and fully sustained in the regulation of federal agencies.

Two of the earliest and at the same time leading cases on the subject are found in one volume of the United States Reports.

National Bank v. Commonwealth, 9 Wall. 353, at 361:

"It certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation."

And at 362:

"The agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. * * * It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

Thompson v. Pacific Railroad, 9 Wall. 579, where the court discussed the rule as to a railroad performing federal services, and stated the rule

that Congress "may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them."

Here we have the rule stated as to taxation, in the one case of a national bank, in the other of a railroad *Railroad Company v. Peniston*, 18 Wall. 5, states the rule as to taxation by the states, which is the same rule that exists as to their police power, and while the statement in the case relates only to one power, it characterizes the other just as aptly. At p. 29:

> "The taxing power of a State is one of its attributes of sovereignty; * * * it exists independently of the Constitution of the United States, and underived from that instrument * * *. No one ever doubted that before the adoption of the Constitution of the United States each of the States possessed unlimited power to tax."

And at p. 30, it quotes the language of *Lane County v. Oregon*, 7 Wall. 77:

> " 'There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by National legislation.' "

The charter of the railroad was designed, the court said, "to secure an agency competent and under obligation to perform certain offices for the general government," the same being "for postal and military purposes." The court concluded, at p. 37:

> "It is impossible to maintain that this is an interference with the exercise of any power belonging to the General government, and if it is not, it is prohibited by no constitutional implication."

Waite v. Dowley, 94 U. S. 527, at 533:

> "The national banks organized under the acts of Congress are subject to State legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation."

In the case of *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 416, the court sustained the regulation of rates of a corporation organized under a statute of the United States and receiving therefrom the corporate power to charge and collect tolls and rates, it being said:

> "There is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress."

McClellan v. Chipman, 164 U. S. 347, citing *Bank v. Commonwealth, supra*, with approval states the policy as to federal agencies to be that of—

> "preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States."

Hibernia Savings & Loan Society v. San Francisco, 200 U. S. 310, quotes with approval the rule, as stated in *National Bank v. Commonwealth* and *Railroad Company v. Peniston, supra.*

Smyth v. Ames, 169 U. S. 466, involved the regulation of the Union Pacific Railroad, there being an express reservation of power to Congress for that purpose, and it was held that in the absence of action by Congress, following th case of *Reagan v. Mercantile Trust Company*, *Thomson v. Pacific Railroad*, and *Railroad Co. v. Peniston*, the state still retained the power of regulating the rates.

New England Telegraph Co. v. Town of Essex, 206 Fed. 926, is one of a long series of cases where telegraph companies that have accepted the provisions of Title LXV of the Revised Statutes, bringing them under the jurisdiction of the postmaster general, have sought to escape state taxation or regulation, on the ground that their power was to be exercised independent of state control. The court said, at pp. 931–932:

> "The company is subject to the taxing power of the state, and to the imposition by the state of police or other regulations not inconsistent with those established by Congress. The taxes imposed, however, must not be of a character, nor the methods of collecting them such as to effect the exclusion of the company from the state or the stoppage of its business. The regulations must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the state or forbidding it to carry on its business therein."

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, quotes with approval the language of *National Bank v. Commonwealth*, 9 Wall. 353, and it is said at p. 551:

> "This court said that the principle of exemption of Federal agencies from state taxation has a limi-

tation growing out of the necessity upon which the principle is founded. 'That limitation is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States * * *.'"

To the same effect is *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688.

Central Pac. R. R. Co. v. California, 162 U. S. 91, arose out of suit brought by the state of California for the collection of a tax imposed by it upon the franchise of the Central Pacific Railroad Company. This company enjoyed a federal franchise (p. 123). Previous cases holding that the federal franchise could not be taxed followed (p. 125), it being said:

"It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a State may tax the property of the agents, subject to the limitations pointed out in *Railroad Co. v. Peniston. Van Brocklin v. Tennessee*, 117 U. S. 151, 177."

And at p. 126:

"So far as the ability of the company to discharge its duties and obligations to the general government is concerned it is difficult to see that taxation of the state franchise would tend to impair that ability any more than taxation of the

roadway, roadbed, rails and rolling stock. If the necessary effect of a tax on such tangible property is not to unconstitutionally hinder the efficient exercise of the power to serve the government, neither can it be so in respect of the state franchise. Indeed the taxation by the State of the franchise granted by it does not, and could not, prevent plaintiff in error from acting under its Federal franchise."

Williams v. Talladega, 226 U. S. 404. While holding in that case on the authority of *Telegraph Company v. Texas*, 105 U. S. 460, that government messages could not be taxed because such taxation would be "a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and therefore void," it nevertheless concludes, after reviewing cases:

"These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the Company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State. Nor is there anything running counter to the former cases in the case of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1."

The power of a state, then, whether of regulation or taxation of a federal agency, before it may be said to affect the federal function in such a way as to

permit Congress to legislate away its existence, must be one the exercise of which retards the execution of the federal purpose or directly interferes with it. And unless such is the natural, necessary, and inevitable result of regulation by the state, Congress not only should properly leave it to the state as a matter of policy, but it may not constitutionally interfere with or supersede such regulations. This rule, we admit, has been generally stated in its negative, rather than its positive aspects. The approach has been from the standpoint of the prohibited limits, rather than of the plenary character within those limits. The emphasis has been constantly directed to the ascertainment of where the power of the state stops, not how far it may proceed. But obviously, the state and federal power in this respect are in a state of exact and proper balance, and to say that a state may not go beyond the boundary where its action burdens or injuriously affects a federal agency in the discharge of federal function, states only half the rule, because up to that limit the state must of necessity retain the constant continuing constitutional power to legislate, free and untrammeled by any suggestion or possibility of Congressional interference. This is but another way of saying that all hat Congress is or can be interested in is to secure he complete and perfect discharge of the designated ederal purpose or function; and that, having assured tself by appropriate legislation that the same will be arried out free from interference or control by the tate, it necessarily follows that Congress can have no urther power or interest in the matter. That this

line of demarcation has not always been clearly kept in mind is apparent. Too frequently we find the limitation, the prohibition on the power of the states has been stressed, and its plenipotentiary character inside the limitation or prohibition has been slurred. But the line of division between state and federal power serves not merely to set for the state "the very sea mark of its utmost sail," but fixes the limit to the course and cruise of federal power as well.

(d) The question of the dividing line for the court, not Congress.

South Carolina v. U. S., 199 U. S. 437, at p. 448:

> "There are certain matters over which the National Government has absolute control and no action of the state can interfere therewith, and there are others in which the state is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, pre-eminently of this—a duty oftentimes of great delicacy and difficulty."

Obviously, Congress cannot be the sole judge of how much or how far legislation is necessary to fully insure the discharge of the federal purpose, because the moment that is assumed to be the rule, then the power of Congress becomes unlimited, and under the guise of furthering federal purpose, it can do whatever it may see fit, with the result of completely overturning the control expressly reserved to the states in matters of police or in the regulation of their internal

affairs. Where and when, then, this mutual bound and barrier exists or arises in any given case is a judicial, not a legislative question, to be settled by the court, not by Congress, not from the standpoint of public policy, but from the standpoint of constitutional power. Otherwise, we have the anomalous result that a limited delegated power has taken on unlimited character.

We think that the early case of *Railroad Company v. Peniston*, 18 Wall. 5, clearly lays down this rule. It points out, at p. 30:

> "It is often a difficult question whether a tax imposed by a State *does in fact* invade the domain of the General government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted."

And at p. 36, it lays down the test of whether in any given case the federal agency is exempt from state taxation or control as dependent—

> "upon the question whether the tax does *in truth* deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."

That the courts have at all times been clear and consistent in their adherence to this fundamental principle as announced in this early decision, candor would permit no one to assert. Neither will reason concede that logic permits the existence of any other rule. And while language can be found in many cases, stating in effect that the existence or exercise of power by the state at all is dependent "on the permissive legislation of Congress," we think that all

such statements must be read in the light of the clear implication or modification that all that is meant is that the state may intrude within the domain of power delegated to or conferred upon Congress by the constitution only with the permission of Congress, and apparently it was assumed in the given case that the state was seeking to intrude within the sphere clearly set aside for Congressional activity.

While this confusion has crept into some of the decisions, so recently as the case of *Hibernia Savings & Loan Society v. San Francisco*, 200 U. S. 310, the court, reaffirming the proposition, at p. 313, "the efficiency of the government service cannot be impaired by a taxation of the agencies which it employs for such service," returns to and reaffirms the test, by quoting the language from the *Peniston* case, that is, "whether the tax does *in truth* deprive them of power to serve the government."

We think it cannot be disputed that the analogy is complete and entire between the relative exercise of power of state and federal government, in the regulation of federal agency in the discharge of federal function, and the like exercise or restraint of exercise of power in the matter of interstate commerce, exclusive jurisdiction over which has been entrusted to Congress. Such exclusive jurisdiction and control in Congress over interstate commerce has been as jealously guarded and protected by the courts as the right to exercise federal function possibly could be. We think in a very real and proper sense, although not expressly so denominated, interstate commerce

is a federal function and its prosecution serves a federal purpose. We believe, therefore, that all cases where the court has asserted its unquestioned right to determine what part of the field should be occupied by state and Congress, respectively, in the regulation of the vexatious and difficult subject of commerce, are forceful precedent to sustain the like exercise of the power of the court to mark the boundary, beyond which neither federal government nor state may go—the one in burdening or seeking to burden the federal function, the other in intruding upon the domain of state activity, under the guise of furthering the free and unhampered exercise of federal function.

The following recent illustrations suffice to establish that it is the province of the court and not of Congress to determine when Congress has encroached upon the field of the state in any dealing with commerce, and consequently in any dealing with federal functions as discharged by government agency. In the *Employers Liability Cases*, 207 U. S. 463, the court, at 496, said:

> "Thus the want of power in a State to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question."

This language, with the substitution of a word or two, would state the rule as to the want of power of a state in dealing with governmental agency. The court then addressed itself, at 498, to the act in question, and held it unconstitutional, because it sought to impose a liability arising out of subjects "wholly outside of the power of Congress to regulate

commerce," and among its illustrations said, "Take a telegraph company engaged in the transmission of interstate and local messages," and concludes, at 499,

> "As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced."

We are quite content to rest the argument upon this proposition upon the statement of the court, in the case of *Hammer v. Dagenhart*, 247 U. S. 251, language equally applicable to the regulation of commerce or governmental agency formally devoted to the exercise of federal purposes, at 276:

> "We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution."

(c) Federal function in question defined efficient "transmission of government communications."

Nor are we left in doubt in the present case as to what that federal function is. We find it stated, although we presume it needed no statement, in the last few lines of the joint resolution. It is the most

efficient possible "transmission of government communications," and Congress has attempted by legislative construction to declare that the issue of stocks and bonds would or might impair or affect the discharge of that function. This, we submit, is the sole purpose of this exception. It could have no other one. It sets out in the plainest possible way what Congress intended. As we shall see, that was the purpose in the act as originally drawn. Its title indicated it, and that title remained until the full and final text of the joint resolution had assumed its present form. That was the initial purpose of the act, and that, by legislative definition, is the present purpose of the act, to wit:

> "To insure the continuous operation of electric communicating systems, to guard the secrecy of war despatches, and prevent communications between public enemies." See H. J. Resolution 309; S. J. Resolution 163. Cong. Record, July 5, 1918, p. 9465.

(f) Regulation of rates by the individual states does not in truth or in fact hinder or retard the discharge of the stated federal purpose.

It being settled, then, that rates must be reasonable and that it is the province of the court to determine whether the determination of that reasonableness by state agencies will imp air the efficiency of the federal function aimed at in the present case, to wit, "to insure the continuous operation of electric communicating systems, to guard the secrecy of war dispatches, and prevent communication between public enemies," we come then to the question: whether state regula-

tion of intrastate rates of telephone companies, in the language of the *Peniston* case, does "in truth, deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."

A mere statement of the proposition would seem to be its own conclusive answer. Regulation being assumed, reasonableness of rates being necessary to be determined, how can it be said that their determination by the tribunal most conversant with conditions and factors involved in reasonable rates, best able to command all information lacking and necessary to decision, will impair efficiency of federal function? The federal courts have expressly recognized that such rates are a local matter. It was said in *Cumberland Tel. & Tel. Co. v. City of Memphis*, 183 Fed. 875, at 877:

> "The conditions in no two cities may be alike, and it seems reasonable to say that questions as to telephone rates may in large measure be local questions to be determined upon factors, among which the most important may be (1) the cost of the plant; (2) the cost of operation and maintenance; (3) the amount of taxes and other dues exacted by the local government; and (4) the rapidity of deterioration due to climatic or other causes. If these be among the controlling factors, no one of them seems to have been considered in any detail by the city."

This being so, does it not follow, not merely that there will be no hindrance to efficient discharge of federal function, but that efficiency will be increased, not diminished, by leaving the determination of rates to be made where the witnesses reside. Em-

ployes and individuals conversant with local conditions could then testify with a minimum of interruption to the service they were expected to render in insuring "continuous operation of electric communicating systems." That very consideration was found sufficient to sustain the order of the director general of the railroads, providing—

> "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

In *Wainwright v. Pennsylvania R. Co.*, 253 Fed. 459, the court, at 465, makes the pertinent inquiry:

> "How are munitions, clothing, food, coal, and other supplies necessary to carry on the war, to be transported expeditiously, if the employes, without whom trains cannot be operated, are to be compelled to leave their employment to attend as witnesses at places hundreds of miles away from where their duties require them to be?"

3. The President cannot arrogate, Congress cannot delegate legislative or arbitrary power.

(a) As to legislative power per se.

As a further aid to the court in construing the joint resolution of Congress, we submit that to adopt the construction which the attorneys for the defense and for the Government contend should be given to this joint resolution would render it unconstitutional, for the additional reason that it would constitute a clear delegation of legislative power.

First, we think that such construction would confer upon the President the power to determine whether there should be regulation of rates, either by himself or by someone whom he might designate. In other words, it would permit him to determine whether there should in fact be any law at all. Secondly, the power of rate making as contended for would itself involve the performance of legislative function.

1. Congress could not delegate to President power to decide between three separate capacities in which he might deal with the telephone and telegraph.

As to the first of these propositions, we ask how could there be a clearer delegation of legislative power conceived ot than such as is involved in defendants' construction of this resolution? Is there not a delegation of the power to determine, not merely that a certain law of well defined character shall come into existence upon the happening of a certain contingency, or the determination of a certain fact by the executive, but what the law so to come into existence shall be?

A well recognized enunciation of the rule against the delegation of legislative power is contained in the leading case of *C. W., etc. R. R. v. Commissioner of Clinton County*, 1 Ohio St., 88, as follows:

> "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance

of the law. The first cannot be done; to the latter no valid objection can be made."

This language has been incorporated into and made a part of its opinion by the Wisconsin court in the early and leading case, *In re Oliver*, 17 Wis. 681, at 685, and has likewise been incorporated into and made a part of the most notable decision discussing the delegation of legislative power by the supreme court of the United States, in *Field v. Clark*, 143 U. S. 649, the language being quoted at 693.

It is true, of course, as stated by the Wisconsin court in the *Oliver* case—

> "There is perhaps no class of questions ever presented for judicial consideration, which involve more real difficulty, or leave greater room for the mind to remain in doubt, than those which involve the boundaries between that legislative power which cannot be delegated, and those discretionary powers which the legislature may entrust to other departments or persons in the execution of the laws."

But it has been said (dissenting opinion of Justice Dodge in the case of *M. St. P. & S. S. M. R. Co. v Railroad Commission*, 136 Wis. 146):

> "The very essential and distinguishing characteristic of legislative action is choosing between different policies on grounds of expediency, and, when choice is made, in declaring for the future a rule of conduct embodying that policy."

The character of power and authority which may save an act from being unconstitutional is, in the language of the Wisconsin court in *State ex rel. Buell v. Frear*,

146 Wis. 291, where the delegated agency is invested "with no arbitrary and uncontrolled discretion," but is directed "to ascertain the facts and to apply the rules of law thereto under the prescribed terms and conditions." Such action is not legislative in character, but is the performance of an executive and ministerial duty within the regulations provided in the a t.

Illustrations of the rule follow:

State v. Duval County, 79 So. 692, at 696:

"(9) The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

State v. Rogers, 73 N. E. 461, 463:

"The Constitution of Ohio (article 2, sec. 20) provides that "the General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of all officers.' The constitution itself having thus in express terms confided to the legislative department the power to fix the compensation of all officers, that branch of the government is without right to delegate such power to a co-ordinate branch."

Sabre v. Rutland R. Co., 85 Atl. 693, 701:

"The General Assembly cannot delegate functions which are purely and strictly legislative, but,

having by general law and by charters made legislative provisions of unquestionable constitutionality applicable to railroad corporations, it may confer upon the commission the power upon investigation to apply the general provisions of law to particular circumstances and situations, and may leave much of detail to the discretion of the commission. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 384, 27 Sup. Ct. 367, 51 L. Ed. 523; *United States v. Grimaud*, 220 U. S. 506, 516, 31 Sup. Ct. 480, 55 L. Ed. 563."

State v. Budge, 105 N. W. 724 (N. D.), was a case involving the delegation of legislative power to a capitol commission. The court said at 727:

"Section 17 of the enabling act prescribes that the lands donated by the United States to the state for public buildings shall be disposed of as provided by the enabling act, and shall be disposed of in the manner provided by the Legislature. The Legislature does not comply with these provisions of the enabling act, when it leaves it, without restriction or direction, to the capitol commission board to dispose of these funds in such manner as it deems wise, subject to one limitation only, that a capitol building shall be remodeled and reconstructed and a governor's residence erected."

The decision of the court in this case was followed and approved in *State ex rel. Miller v. Taylor*, 145 N. W. 425.

Stating the rule most favorably to the defendants:

"Congress cannot be permitted to abandon to others its proper legislative functions; but in time of war when legislation must be adapted to many situations of the utmost complexity, which must be dealt with effectively and promptly, there is

special need for flexibility and for every resource of practicality; and, of course, whether the limits of permissible delegation are in any case overstepped always remains a judicial question." *Address of Charles E. Hughes, before Bar Association*, Vol. 52, *Reports of American Bar Association*, p. 241.

In the present case, having regard to the joint resolution alone, if it were to be construed as the postmaster general has sought to construe it and as the defense contend it should and must be construed, it would grant just the character of power which the opinion of the Wisconsin court in the civil service case quoted above says "may not and cannot be constitutionally granted," and therefore it must be held unconstitutional. No question is raised now as to the power of Congress to provide that the operation of the telegraph and telephone should be undertaken upon the ascertainment and determination as a fact by the President that the public necessity required that they should be taken over; but beyond delegating to the President the general power to take over the telephone and telegraph and operate the same under prescribed conditions, which we think has clearly been done, Congress could not go.

But here under their construction we have the much more fundamental determination of public policy to be made by the President between two alternative and, to some extent, inconsistent methods of exercising power. In other words, if their contention is to prevail, the President has the clear discretion to choose between operation under existing conditions, on one hand, or to regulate by fixing

rates, on the other. Or he might have the third alternative—which the postmaster general has practically sought to exercise—of a mixed power to take possession, control, and operate, coupled with the power to regulate the rates. Here are three distinct alternatives which in varying degrees might be exercised by the President, none of which is specifically denominated in the act of Congress at all, because in our judgment the act clearly provides for operation through the medium of existing organizations. If their construction is to obtain, the possibilities of Presidential determination are unlimited. By executive fiat, the telephone systems might be made a part of the military establishment; they might be constituted a part of the postal system they might be left to existing management, or the President and postmaster general might do what they have done. This construction, to our mind, involves no mere matter of determining when a law shall go into effect, but involves the proposition of unlimited power to legislate upon a subject which Congress has seen fit to confide in its entirety to executive discretion.

It was clearly competent for Congress to invest the President with power to determine whether such operation should be undertaken in the interests of the national defense, but had the act in plain terms stated what the defendants contend, had it specifically provided that the President at his option might constitute himself (1) a rate fixing agency with functions entirely analogous in character and kind to those of the Interstate Commerce Commission and

the existing rate commissions of the various states; (2) or constitute himself the general manager of all existing telephone systems, subject to all existing regulations; or (3) to assume the power of manager and the power to fix rates as well, we think that there would be unquestionably such attempt at the delegation of legislative power—such abdication of the function with which the constitution has invested Congress and no other, as to render the joint resolution clearly invalid. As we have said, we think the resolution does nothing of the kind, and that the court will not even need to consider the question of attempted delegation of legislative power, because we think no such attempt was made. The act did not attempt to confer upon the President the discretion and the authority which the defense seeks to claim for him.

2. The power to fix rates could not be delegated.

This aspect of the matter as just considered is quite separate and distinct from the like delegation of power involved in the matter of conferring unlimited discretion in the fixing of rates.

If we were to construe the act as the defense would have us construe it, then it is entirely conceivable that in the exercise of Presidential discretion, having the power to regulate—which we assume arises, if at all, by reason of the term "supervision"—then the President might, if he saw fit, regulate the rates of the telephone companies and stop there—he being the absolute judge of the extent and manner in which his power should be exercised, for we are advised

that he has absolute, unlimited, uncontrolled discretion. This alone, we think, under the language of the Wisconsin court in 136 Wis., would be enough to condemn it, *Minn. St. P. & S. S. M. R. Co. v. Railroad Commission*, 136 Wis. 146 at p. 164.

> "If it were conceded that the commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a delegation of pure legislative power to the commission."

The President would have the alternative of putting into effect not merely one of several rates which were reasonable, but he would have the right, as the defense claims, to put into effect any rate that he saw fit, whether reasonable or otherwise. That, the courts have challenged as something that could not be done.

It is too clearly established to need citation, that the fixing of rates is a legislative function. We find that the sole sustaining theory upon which the power of rate fixing by commissions or other repositories of delegated power rests is that the function of the commission is limited to the ascertainment of a fact, to-wit, a reasonable rate, and that upon the ascertainment of such fact, the law automatically adopts and takes unto itself the rate so ascertained and determined as reasonable, as not merely the condition rendering the law operative, but coincidently as the exact term of the law itself.

The whole theory of the matter has been most lucidly phrased by the Wisconsin court in the case of the *Soo Railroad v. Railroad Commission*, 136

Wis. 146, at page 163, prefacing the discussion with a reaffirmance of the language of Justice Redfield, in *State v. Parker*, 26 Vt. 357, that the contingency or fact must be "so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one." The court continues:

> "The legislature may delegate any power not legislative which it may itself rightfully exercise. *Wayman v. Southard*, 10 Wheat. 1. *This power to ascertain facts is such a power as may be delegated.*
>
> "The cases heretofore cited with reference to the constitutionality of laws creating a railroad board or commission and authorizing the latter to ascertain and fix reasonable rates, which rates, thus ascertained, would be thenceforth in force, rest on these rules of law. * * * This law (ch. 362, Laws of 1905) establishes, and thenceforth assumes, the existence of rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the Railroad Commission the duty to ascertain and disclose that particular rate, charge, classification, or service. The law intends that there is only one rate, charge, or service that is reasonable and just * * * But the theory and the mandate of the law is that this point always exists under any combination of conditions and is always discoverable although not always discovered. Until it is discovered and made known the former rates and service prevail. The order of the Commission is *prima facie* evidence that the rate, charge, or service found and fixed by it is the particular rate, charge, or service declared by the legislature in general terms to be lawful and to be in force. If it were conceded that the Commission had power or discretion to fix one of several rates, either of which would be just and reasonable, *it would be hard to say that this was not a delegation of pure legislative power to the Commission.* But

the theory of this law is to delegate to the Commission the power to ascertain facts and to make mere administrative regulations."

(b) A delegation such as claimed would also be void as an attempt to delegate arbitrary power.

Frequently we find assertion of the proposition that arbitrary power cannot be delegated. Sometimes this is treated as synonymous with legislative power for the reason we presume that within constitutional limitations the legislature is not accountable for motive or reason and in that sense its action is arbitrary.

The rule so stated in

Sheldon v. Hoyne, 103 N. E. 1021, 1022:

"Unlimited power, to be exercised in accordance with the whim or caprice of public officials, is inconsistent with our system of government. *Moore v. Mayor of Danville*, 232 Ill. 307, 83 N. E. 845. Any law that compels a man to hold 'any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. Such arbitrary power is, under the settled rules of law in this and other jurisdictions, a delegation by the Legislature of its legislative functions to the officials in question and is therefore invalid. *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *City of Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *Commonwealth v. Maletsky*, 203 Mass. 241, 89 N. E. 245, 24 L. R. A. (N. S.) 1168; *Little Chute v. Van Camp*, 136 Wis. 526, 117 N. W. 1012, 128 Am. St. Rep. 1100; *State v. Tenant*, 110

N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 745."

"Arbitrary power and uncontrolled authority were not recognized" in the principles of the common law. Cooley Const. Lim. p. 50.

The authorities cited at p. 27 of this brief govern. *Little Chute v. Van Camp*, 136 Wis. 526, seems to embody a decision covering all the principles applicable here.

"The defendant was convicted of violating an ordinance of the plaintiff village reading as follows:

" 'All saloons in said village shall be closed at 11 o'clock p. m. each day and remain closed until 5 o'clock on the following morning, unless by special permission of the president.'

"We regard the ordinance as void for two reasons: First, because it attempts to confer arbitrary power upon an executive officer, and allows him, in executing the ordinance, to make unjust and groundless discriminations among persons similarly situated (*State ex rel. Garrabad v. Dering*, 84 Wis. 585, 54 N. W. 1104); second, because the power to regulate saloons is a lawmaking power vested in the village board (Stats. 1898, sec. 893, subd. 26), which cannot be delegated. A legislative body cannot delegate to a mere administrative officer power to make a law, but it can make a law with provisions that it shall go into effect or be suspended in its operation upon the ascertainment of a fact or state of facts by an administrative officer or board. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm., ante, p.* 146, 116 N. W. 905. In the present case the ordinance by its terms gives power to the president to decide arbitrarily and in the exercise of his own discretion when a saloon shall close. This is an attempt to

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vest legislative discretion in him, and cannot be sustained.

"It is said that the latter clause of the ordinance may be stricken out as unconstitutional, and the balance, requiring saloons to close at 11 o'clock, may still be held valid. This, however, cannot be done, because it is very plain that the clause giving the president power to suspend the operation of the law at will is a compensation for the first clause. They are bound together, and the invalid clause was evidently a material inducement to the otherwise valid portion. *State ex rel. Walsh v. Dousman*, 28 Wis. 541."

Milwaukee v. Ruplinger, 155 Wis. 391, at p. 397, while denying the application of the principle to the instant case, condemns—

"power to act arbitrarily so as to suppress the business of keeping junk shops instead of regulating it, or to pass favorably upon one candidate for a license and unfavorably upon another under the same or similar circumstances, or to do otherwise than, having the 'good order of the city' as the objective, pass reasonably upon the suitability of a candidate for license, within the field of that discretion which is administrative as distinguished from legislative, and acts upon judgment as distinguished from acting upon mere whim, prejudice, or caprice."

The court says truly—

"It is not always clear as to whether a power is legitimately conferred because administrative or illegitimately bestowed because legislative."

State ex rel. Garrabad v. Dering ,84 Wis. 585, at page 595:

"The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any city officer an arbitrary authority, making him in its exercise a petty tyrant."

VI

ASSUMING THAT THE PRESIDENT WAS GIVEN THE RATE MAKING POWER BY THE ACT IN QUESTION, IT WAS NOT DELEGATED BY HIM TO THE POSTMASTER GENERAL.

We have already seen that the terminology employed in the joint resolution of Congress was not such as would naturally vest the President with the powers of rate making; that the language, rather, was calculated to create a legislative receivership; that had Congress intended to give him the rate making power, the phrase, "to regulate the rates," or "to fix the rates" would have been inserted in the resolution, and have taken the matter out of all controversy; that it is apparent that whatever relief and benefit was to be obtained was sought through speeding up and improving the efficiency of the management of the utility as it stood; that a revolution in operation was intended, perhaps, but not a revolution in existing governmental agencies. The failure to provide any machinery for the ascertainment and determination of what a just and reasonable rate should be; the sweeping aside with one act the elaborate and extensive organization developed

through the slow fruition of years, and the substitution therefor of the unregulated will of a single individual—all of these considerations seem to us to conclusively negative the thought that such power was conferred. But be this as it may, whatever the power given to the President was, it is only the quantum of power passed on by him to the postmaster general with which we are concerned in this action, and it does not necessarily follow that, even if the President was completely invested with the rate making power, he has seen fit to pass that power on to the postmaster general. In fact, it seems to us that the wording of the Presidential proclamation clearly indicates that the President at least intended that the management by the postmaster general should be a species of federal receivership, as we have contended.

Paragraph 2 of the proclamation provides "that the supervision, possession, control, and operation of such telegraph and telephone systems * * * shall be exercised by and through the postmaster general." It then provides that the said postmaster general may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, *through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems.* As we read this sentence, giving the words employed their natural, ordinary, reasonable meaning, the conclusion is unescapable that whatever power the postmaster general was to receive or possess was to be exercised through the existing management of the

telegraph and telephone systems. Indeed, the next sentence expressly provides that the owners should "continue the operation thereof in the usual and ordinary course of the business of said systems," until the postmaster general should otherwise provide, emphasizing, as we think, the idea that the existing and orderly scheme of things was to be disturbed just as little as possible; that whatever regeneration or betterment or improvement of service was to be had, was to be arrived at through the medium of existing organizations, guided or supervised, stimulated and infused by one centralized, coordinating, controlling power.

Whatever the power conferred upon the postmaster general may be, that power may be exercised through the existing management. The court need not go the full length to which we ask, that the power delegated to the postmaster general can *only* be exercised through the owners, managers, boards of directors, receivers, etc., of the telephone systems. Possibly this is incorrect, but it is absolutely clear that the power with which the postmaster general was invested by the order of the President was such that the postmaster general *may perform the duties hereby and hereunder imposed upon him through the owners*, etc. In other words, it is clear from the reading of the Presidential proclamation that *all* of the power that the postmaster general received, if not necessarily, might be, exercised through the owners, managers, etc. This is sufficient, it seems to us, to stamp the indelible character of the power. The court need not find that the existing organization is the exclusive

medium for the exercise of the power. It is enough if it is a permissive vehicle through which the fullest quantum of power may be exercised, for then it can only be such power as is ordinarily exercised through managers—not power ordinarily exercised through regulating commissions.

Necessarily and naturally the power which may be exercised through owners, managers, boards, etc., is managerial power, is operating power, is power in the conduct of business. Is it not perfectly obvious and apparent that if the rate making power had been conferred upon the postmaster general and it was left optional with him to leave such power with the various public utility commissions, the President, who seems to have been industrious in the enumeration of instrumentalities through whom the power might be exercised, would have gone further and specified that until he should otherwise determine, the rate making power might be exercised through the various regulating commissions? This was provided in the Presidential proclamation of December 26, 1917, under which the railroads were taken over. Such language would have been an apt and appropriate expression of the idea which it is now contended the President sought to express. It surely cannot be argued that there was any intention to confer additional prerogatives or power upon the owners, managers, and boards of directors. And we deem the conclusion inevitable, therefore, that the power conferred upon the postmaster general was such power, and such power only, as might appropriately find expression through the activities of the owners, managers, etc.

VII

RATE MAKING POWER, IF GRANTED BY JOINT RESOLUTION, VESTED IN PRESIDENT PERSONALLY, AND CANNOT BE DELEGATED.

As a second and additional proposition, we assert that the discretion imposed by the joint resolution was by it vested in the President personally, and that under elementary principles the President cannot divest himself of that discretion by imposing or conferring it upon someone else.

So that, even if the joint resolution be construed as conferring upon the President the power to fix rates, the President has no power to re-delegate the discretion confided in him.

Such is the rule announced by many courts.

Lord v. City of Oconto, 47 Wis. 386. This case involved the construction of ch. 104 of the Private & Local Laws of Wisconsin, which was an act to authorize the city of Oconto to extend and maintain a pier into the waters of Green Bay. Section 14 thereof provided:

> "The mayor and common council shall have power to regulate the toll upon said pier and road, and such toll shall be applied to the repairing and expenses of collecting said tolls. The balance of said tolls shall be applied to the payment of the interest on said bonds, then the principal."

An attempt having been made to lease the pier so constructed and confer the power to fix tolls, the

court held this agreement unquestionably void, saying at page 388:

> "The power to regulate the tolls was vested *solely*, by the legislature, in the mayor and common council, and such power could not be delegated by the common council alone, or jointly with the mayor, to any other officers or persons by lease or otherwise. This principle is elementary, and scarcely needs the support of reported cases, but is most distinctly recognized in all of the cases upon the subject."

Smith v. Black, 115 U. S. 308, at 319:

> "Where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person."

Muir v. Louisville & N. R. Co., 247 Fed. 888, 894. Considering the parallel situation arising under the act for the control of railroads and the authority of the director general thereof, prior to the enactment of the legislation of March 21, 1918, construing the act of Congress which authorized the President "through the Secretary of War to take possession and assume control," the court says:

> "Besides being an appropriate function of the War Department, it was the plain meaning of the statute which Congress enacted that the War Department should have authority over it, and even if we assume (which is inconceivable) that the Secretary of War declined for that department to take up the war work indicated we find nothing in the statute which authorizes it to be taken up by the Treasury Department, nor by a Director General of Railroads; Congress not having intrusted the work to either. And the situation, if strict rules were to operate, might involve consideration of

the question whether the rule states by the Supreme Court in *Smith v. Black*, 115 U. S. at page 319, 6 Sup. Ct. 56, 29 L. Ed. 398, to the effect that, 'where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person,' would not apply.

Rhodes v. Tatum, 206 S. W. 114, says of this decision:

"It was doubtless this criticism of the act which induced Congress to pass the law of March 21, 1918, and we think this act cures the defects in the former act discussed by Judge Evans."

29 *Cyc.* 1433.

"Discretionary or judicial powers, finally, may not in the absence of statutory authority be delegated."

Clark v. Washington, 12 Wheat. 40, at p. 52:

"The charter enacts, 'that the corporation shall have full power and authority' 'to authorize the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of $10,000. And provided also, that the object for which the money is intended to be raised, shall be first submitted to the President of the United States, and shall be approved of by him.' "

That the language did not authorize an assignment or delegation of the power to conduct such a lottery was held by the court, in the following language:

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"There is great weight, too, in the argument that it is a trust, and an important trust, confided to the corporation itself, for the purpose of 'effecting important improvements in the city,' and ought, therefore, to be executed under the immediate authority and inspection of the corporation. It is reasonable to suppose that congress, when granting a power to authorize gaming, would feel some solicitude respecting the fairness with which the power should be used; and would take as many precautions against its abuse, as was compatible with its beneficial exercise. Accordingly, we find a limitation on the amount to be raised, and on the object for which the lottery may be authorized. It is to be for 'any important improvement in the city,' which the ordinary funds or revenue thereof will not accomplish; and is subjected to the judgment of the President of the United States. The power thus cautiously granted is deposited with the corporation itself, without an indication that it is assignable. It is to be exercised, like other corporate powers, by the agents of the corporation, under its control. While it remains where congress has placed it, the character of the corporation affords some security against its abuse; some security that no other mischief will result from it than is inseparable from the thing itself. But if the management, control, and responsibility may be transferred to any adventurer who will purchase, all the security for fairness, which is furnished by character and responsibility, is lost."

Kinney v. Howard, 133 Ia. 94, at 105:

"Where the act to be done involves judgment or discretion, it cannot be delegated to an agent or committee." Citing *Lord v. Oconto*, 47 Wis. 386; *Lauenstein v. Fond du Lac*, 28 Wis. 336.

Mechem on Public Officers, Sec. 567:

"This rule applies also to public officers. In

those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he can not delegate his duties to another."

City of Jacksonville v. Ledwith, 7 So. 885 (Fla.), at p. 891:

"A public duty which the legislature has confided to the deliberative judgment or discretion of the law making power of a municipality cannot be delegated by the latter to the judgment or discretion of one constituent element of that power, nor to the judgment or discretion of others. To permit it to be done would be to defeat the will of the legislature as to whose judgment or discretion should direct the subject-matter of the duty confided."

Arnold v. Pawtucket, 41 Atl. 576, at p. 578:

"Being powers, then, in the exercise of which the inhabitants of the district are beneficially interested, the exercise of such powers is mandatory; and this, too, though the language of the statute is permissive and not imperative. (Citing cases). If mandatory on the district, it necessarily follows that the district cannot delegate the exercise of such powers to the city of Pawtucket. The rule that powers of this nature cannot be delegated has been so often applied as to have become almost elementary."

Mechem on Agency, Sect. 313.

"Purely administrative or ministerial powers may be delegated, but wherever judgment and discretion are to be exercised,—where legislative pow-

ers are involved, where rates are to be fixed, policies determined, and the like—there the body or officer entrusted with the duty must exercise it; it cannot be delegated or farmed out."

McQuillin, Municipal Corporations, Sec. 382.

"Therefore, the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others."

Beer Co. v. Massachusetts, 97 U. S. 25, at p. 33:

"The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 645."

State ex rel. Nehrbass v. Harper, 162 Wis. 589, at 593:

" 'Under our constitutional form of government the legislature cannot delegate legislative powers to any officer or to any body of persons, individual or corporate, aside from the power to confer local legislative and administrative powers on county boards and municipal corporations.' *State ex rel. Carey v. Ballard*, 158 Wis. 251, 257, 148 N. W. 1090.

"If the state cannot delegate such power, certainly a common council cannot redelegate legislative power properly delegated to it."

Kohl v. Beach, 107 Wis. 409, at 415-416:

"True, an agent may employ others to assist him in the purely ministerial and unimportant details

of his employment, but not to do the essentials of the agency, involving the skill, intelligence, responsibility, and judgment that is at the very bottom of the employment. The special confidence reposed in the agent as to such matter precludes him from delegating his trust to others, except upon some express understanding with his principal."

Hitchcock v. Galveston, 96 U. S. 341, at 348:

"It is true, the council could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case."

Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385.

Head Note: "Municipal corporation authorized by charter to pass ordinances directing streets to be improved 'in such manner as they may prescribe,' must presc ibe by action of the common council the manner of making an improvement directed by an ordinance; and can not authorize it in general terms, leaving the manner of making it to be determined by administrative officer."

Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105, at pp. 106–107:

"If discretion and judgment are to be exercised, either as to time or manner, the body or officer intrusted with the duty must exercise it, and cannot delegate it to any other officer or person. * * * The council directed, not in a specific case, but in all cases, that the superintendent of streets should 'cause the work to be done,' thus delegating the precise authority conferred upon it. The charter conferred the power upon the council to cause it to be done by *contract or otherwise*. This requires

the exercise of discretion and judgment as to the manner in which the work should be done. Whose judgment is to be exercised? The legislature has said that it is the judgment of the council, but the latter has attempted to invest the superintendent of streets with its exercise. This they had no power to do."

Runkle v. United States, 122 U. S. 543, at 557:

"This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another."

VIII

DOES ATTEMPT BY PRESIDENT TO DELEGATE ALL, OR AS IN THIS CASE, MORE THAN THE DISCRETION VESTED IN HIM ENTIRELY INVALIDATE PROCLAMATION, SO AS TO CONFER NO AUTHORITY ON POSTMASTER GENERAL AT ALL?

Can the Presidential proclamation be construed as a valid delegation of any authority at all to the postmaster general?

So far our argument has proceeded upon the theory that the language of the proclamation should be so construed and must be construed, if it is to be saved from unconstitutionality, as, according to the

postmaster general, merely the right to make decisions in the management of the property, such as the private owners would be authorized to make, but not of an arbitrary character in a governmental sense.

We have assumed that it *might* be so construed. To our mind there is serious doubt whether this be true. We recognize of course as phrased in *Wilcox v. Jackson*, 13 Peters 497: "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." And that as was said in *Williams v. The U. S.*, 1 How. 290, it would be utterly impracticable for him to "become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services."

In the present case, we have an act of Congress which we will assume invests the President with the very broadest possible discretion, as contended for by the telephone company and the Government. Note the language:

> "The President * * * is authorized and empowered, whenever *he* shall deem it necessary * * * to supervise or to take possession and assume control * * * and to operate * * * in such manner as may be needful or desirable."

(a) The language of the presidential proclamation confers all the discretion vested in him.

If this does grant such broad discretion to the President in the matter of dealing with the various wire systems, is it not obvious that this discretion is essentially and inherently of a personal character,

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that while of necessity many of the details of the Presidential operation must be worked out through subordinates and it cannot be expected that the President shall be burdened with all of the details of management and supervision, does not his proclamation in the present case undertake to do very much more than that? It specifically provides:

"It is hereby directed that the supervision, possession, control, and operation * * * shall be exercised *by* and through the Postmaster General."

And again:

"Said Postmaster General may perform the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as *he* shall determine."

And again:

"Until and except so far as said *Postmaster General* shall from time to time by general or special orders otherwise provide * * *."

And again, as to dividends, the same may be paid: "until and unless the said *Postmaster General* shall from time to time, otherwise by general or special orders determine."

And again:

"By subsequent order of said *Postmaster General* supervision, possession, control, or operation, may be relinquished in whole or in part * * *."

And finally:

"From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone

systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Post-General without further act or notice."

First, we find the broad general statement phrased in terms of the joint resolution itself, by which the President states in so many words that all of the powers enumerated shall be exercised "by and through the postmaster general;" then, language subsequently following, delegating to the postmaster general the absolute discretion as to whether he shall continue the exercise of the power at all.

In our judgment, the discretion of the postmaster general expressed in the Presidential proclamation is as broad as that which called forth the condemnation of the court in *People v. Klinck Packing Company*, 214 N. Y. 121, at 138:

> "The question whether the statute shall take effect in any, all, or no cases is left wholly to his volition. Under its terms he has the power without check or guidance, so far as we can perceive, to veto the entire clause and decide that its benefits shall never be extended to any case although it comes within the precise terms of the statute, or to permit the exemption in one case and deny it in another precisely similar one."

Congress having shown its unlimited faith in the discretion of the President, giving him absolute power to operate the lines as he saw fit, vested *him* with that discretion. To say this is a wholly and totally different thing from saying that a broad expression of confidence and a broad discretion invested in him was equivalent to granting him the

authority not to exercise the power at all himself, and to effectually attempt to divest himself of discretion, and confer *all* the discretion sought to be imposed upon someone else, in whom Congress might or might not have had the confidence that it had in the President.

In the present case, it should be remembered that there is no existing office or medium to which the discharge of the contemplated duties are clearly appurtenant. It is not of the character of an act authorized to be done by the President with reference to a military reservation for the administration of which the Department of War exists, and which power is to be exercised by the President through the Secretary of War, or like an act with reference to the public lands directing that the President shall ascertain or determine certain things, and there being a Department of the Interior, his exercise of discretion or determination may properly be made through that medium. Here is a case where there is no existing medium or agency at all, and the appointment of the President, or the delegation of this power to the President, is *sui generis*.

The fact that the President was selected was not inherent in the situation at all. Congress might just as well have selected one of the governors of an existing state, or might have selected the head of an existing telephone system. Had this been done, could it then be successfully argued that such head of the telephone system or such governor could by proclamation have delegated all the power entrusted to him to the postmaster general, or to some other

governor, or any other individual not selected or designated by Congress. The confusion of thought incident to looking upon this as a discharge of function by the commander-in-chief of the army and navy should be avoided. The President, in the performance and discharge of this particular power, is acting merely in a delegated capacity as the representative of Congress, and he can no more delegate all of the power and discretion vested in him by Congress than he could, in the first instance, have legislated by executive fiat.

The language of *Muir v. Louisville & N. R. Co., supra*, construing the original railroad act, which marked a stage in the development of railroad control parallel to that of the joint resolution we are considering, is especially pertinent. The quotation is from p. 895.

> "On its face the act of August 29, 1916, does not give authority to the President to make or promulgate a proclamation of any character. No one, however, could or would contend that he had not abundant authority to issue such documents whenever he thought it proper to give notice or information to the public. But such papers cannot have any effect as laws, in the absence of express constitutional or congressional authorization."

Nor does the act of May 20, 1918, save the situation. That act, as plainly appears, referred only to the redistribution of functions among executive agencies, including any functions, duties, and powers *hitherto* by laws conferred upon any executive department. Doubtless this was an attempt to validate the attempted creation of the Director General of rail-

roads, but in plain terms it referred to the redistribution of functions, not to the creation of functions, and refers expressly to those *hitherto conferred.* The maxim, *expressio unius est exclusio alterius,* Sutherland, Statutory Construction, sections 491—496, seems peculiarly applicable.

This being the situation, has such proclamation in this case any more force or effect than if it had been issued by the President of his own motion without any enabling legislation by Congress? It being clear that the President could not have made the promulgation in question without act of Congress, and there being nothing in the act of Congress authorizing it, does it not follow as a matter of necessity that it is a mere nullity? The cases we submit would be very clear authority that, had Congress endowed the President with the power to fix telephone rates, he could not without the retention of some supervision or control have delegated that power, any more than the governing body of a municipality could do. This situation is one of exact parity. A municipal council gets whatever legislative power it has from the legislature; the President derives whatever power he has from Congress; the rate commission gets its power from the legislature; the Interstate Commerce Commission derives its power from Congress. There is no question but what any or all of these bodies may, and in fact must, act through appropriate subordinates. But would it be argued for one moment that it would be competent for the members of the Interstate Commerce Commission to pass a resolution and give it to the press, announcing that

they would exercise their rate making powers "by and through" one of the justices of this court; or that the Interstate Commerce Commission would exercise its power "by and through" the postmaster general?

We do not think that it will be argued that the President under the terms of the present act, might do what was done by the civil war act—that is, place under military control all the officers, and employes belonging to the telegraph companies, "so that they shall be considered as a post road and a part of the military establishment of the United States." Clearly, that would be the exercise of legislative power by the President. And yet, it seems to us, he would have just as much power by proclamation to, constitute the existing telephone and telegraph organizations a part of the army, as he has to say that he will invest the postmaster general with *all* the authority that has been delegated to or imposed upon him. He could do one no more than the other, and in our judgment, he is powerless to do either.

(b) The proclamation, construed as a legislative enactment, undertakes to confer greater discretion than the President himself received.

Assuming that the Presidential proclamation is authorized, then we suppose we are to test it as a legislative enactment should be tested. And under this rule it seems clear to us that the legislature itself could not have done directly what the Presidential

proclamation here assumes to do. The proclamation, as we have seen, imposes the absolute discretion on the postmaster general as to "how long, to what extent, and in what manner" he shall exercise his powers through the owners, managers, or boards of directors, and again provides that "by subsequent order" he may relinquish in whole or in part the "supervision, possession, control, or operation" which is hereby assumed. And nowhere is he limited to doing these acts in the interest of the national security or defense.

The Presidential discretion is by the express terms of the resolution a limited one. The discretion of the postmaster general by the express terms of the proclamation is an unlimited one.

As was said in *Sheldon v. Hoyne*, supra—

> "It places in the hands of the * * * designated officer power to say who shall be amenable to the law, and this, too, without any limitations, directions, or fixed rules as to the exercise of his discretion."

Is not the language in the case of *State v. Butler*, (Maine) 18 Am. & Eng. Ann. Cas. 487, directly applicable? Does not the Presidential proclamation in express terms provide, paraphrasing the language of that case: "It leaves the existence or non-existence of" government control wholly to the discretion of the postmaster general? In the language of that case, "He is not required to find any fact. He need not give any reason or have any reason." "Supervision, possession, control, or operation" are "to be continued or not, at his pleasure."

Continuing, he might even continue or abandon it "for the purpose of blocking" the efficient prosecution of the national defense. Still paraphrasing, "True, no such action by" the postmaster general "is to be anticipated, and true also that the" President "undoubtedly assumed" the postmaster general would use the power only for the prosecution of the national defense, but he could use it to cripple the national defense, and most effectually if the proclamation were valid. And, as that case concludes:

"The test is what he could do, not what he probably or undoubtedly would do."

Meade v. Dane County, 155 Wis. 632, at 639:

"An invalid statute is not rendered valid merely because those whom it attempts to authorize will probably have too much good sense to avail themselves of such authority."

People v. Klinck Packing Co., 214 N. Y. 121, 138–139:

"Of course, it is not to be assumed that the commissioner of labor would intentionally be arbitrary and unreasonable in the exercise of this power, but nevertheless the legislature has attempted to confer upon him the opportunity which would permit of these shortcomings and we are to judge of a statute by what is possible under it. In the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very fallible in the execution of them."

(c) Rule of law that clauses giving the Postmaster General power evidently a material inducement to valid parts of proclamation, and therefore whole proclamation void.

And because the court cannot say that the President would have granted the power without this unlimited and illegal discretion does it not follow that the postmaster general has no power in the premises at all?

See *Little Chute v. Van Camp*, 136 Wis. 526.

The rule contended for is given in 36 Cyc. 976–977:

> "It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other that which is constitutional may stand, while that which is unconstitutional will be rejected. The rule is, however, subject to several important limitations, and the whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and interdependent in subject-matter, meaning, and purpose that it cannot be presumed that the legislature would have passed the one without the other."

The Wisconsin court has followed this in State ex rel. *Walsh v. Dousman*, 28 Wis. 541. Here the legislature passed an act creating an auditor for Milwaukee County, whose duties took from the supervisors much of their power in allowing accounts and making contracts. Law held unconstitutional, as it violated Article IV, Section 23, providing for one uniform system of town and county governments.

> "The law on this subject, as settled by this court, is, that in such cases, where the void parts of the

statute were evidently designed as compensation for, or inducements to, the valid portions thereof, so that the whole taken together warrant the belief that the legislature would not have passed the valid portions alone, the whole statute should be held inoperative." p. 547.

The valid functions of the auditor here were of so little importance or benefit to the county that the court did not believe they were the inducement for the act, and so held the whole thing void.

In *Warren v. Mayor and Aldermen of Charleston*, 2 Gray (64 Mass.) 84, the facts are not similar to our case, but the court by Shaw, Chief Justice, well expresses the principle contended for on pp. 98, 99 of the opinion:

"It is no doubt true, as has been argued by the learned counsel for the prosecutors of this writ, that the same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. * * * But this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

The Supreme Court of the United States, in *Poindexter v. Greenbow*, 144 U. S. 270, 304, says:

"It is undoubtedly true that there may be cases

where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact."

See also *Sheldon v. Hoyne, supra.*

Head Note 8: "If the unconstitutional part of a statute so limits the remainder that when considered apart from the unconstitutional part it differs essentially in its operation and effect from the whole law, including the unconstitutional part, the act is invalid as a whole."

(d) Nor can the Presidential proclamation be saved by resort to the preamble.

The rule permitting examination of the preamble of a statute is familiar.

Lackland v. Walker, 151 Mo. 210, 52 S. W. 414.

"While a preamble may be looked to in some cases to elucidate a statute, this can only be done where there is need for elucidation. The doubt or ambiguity in question must arise from, or exist in, the body of the act, and the preamble cannot be invoked to create the conditions precedent to its consideration in the premises."

36 *Cyc.* 1132.

"But where the enacting part of the statute is unambiguous, its meaning will not be controlled

or affected by anything in the preamble or recitals."

Yazoo Railroad Co. v. Thomas, 132 U. S. 174, 188:

"Again, the preamble to the act is referred to by counsel, as sustaining their construction, because it is therein declared that the work is one of 'great public importance,' and 'to be encouraged by legislative sanction and liberality.'

* * *

"But as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up."

Price v. Forrest, 173 U. S. 410, at 427:

"Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions. *United States v. Fisher*, 2 Cranch 358, 386; *United States v. Palmer*, 3 Wheat. 610, 631; *Beard v. Rowan*, 9 Pet. 301, 317; *Holy Trinity Church v. United States*, 143 U. S. 457, 462, *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550."

Sutherland, Statutory Construction, Sec. 341, p. 654:

"The preamble may explain an equivocal expression used in the enacting part, but it can never control its obvious meaning, nor supply matter

not within the spirit and meaning of the statute itself."

Within the rule of these decisions, there can be neither necessity nor occasion for resort to the language of the preamble of the Presidential proclamation, as it in plain terms, without reservation or condition, undertakes to confer upon the postmaster general the right to exercise unlimited power without restriction, condition, or reference to any occasion or contingency arising out of the national welfare, the national security, the national defense, or anything outside of the unadulterated whim of the postmaster general himself.

We conclude, therefore, that the authority of the postmaster general can only be saved, if it can be saved at all, by adopting the construction for which we have argued, and rejecting that for which the defense and the Government contend. And in the light of further investigation and reflection, we record our doubt as to whether it can be so saved.

IX

PRACTICAL CONSTRUCTION OF THE LAW BY THE POSTMASTER GENERAL AND THE TELEPHONE COMPANIES, AS ILLUSTRATED BY COMPENSATION AGREEMENT.

That contemporary construction of a doubtful statute may be entitled to great weight and decisive of the true construction is elementary.

Sutherland, *Statutory Construction*, secs. 472, 473, 474;
Black, *Interpretation of Laws*, p. 289, sec. 92.

1. In compensation agreement with telephone companies.

The position of the defendant telephone companies is that, during what they characterize as the period of federal operation, the laws of the states with reference to the operation of telephone companies are not applicable to the operation of the defendants of their telephone lines and have not been applicable thereto since midnight of the 31st day of July, 1918.

This, of course, is a mere conclusion of the pleader, but it takes the only logically permissible position. That is, that all laws, regulation, and control of the telephone business are suspended *ad interim;* that the Government is operating the telephone system as a governmental agency, freed from all restraint except as expressly specified in the act of Congress in the

not within the spirit and meaning of the statute itself."

Within the rule of these decisions, there can be neither necessity nor occasion for resort to the language of the preamble of the Presidential proclamation, as it in plain terms, without reservation or condition, undertakes to confer upon the postmaster general the right to exercise unlimited power without restriction, condition, or reference to any occasion or contingency arising out of the national welfare, the national security, the national defense, or anything outside of the unadulterated whim of the postmaster general himself.

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This, of course, is a mere conclusion of the pleader, but it takes the only logically permissible position. That is, that all laws, regul tion, and control of the telephone business are suspended *ad interim;* that the Government is operating the telephone system as a governmental agency, freed from all restraint except as expressly specified in the act of Congress in the

matter of taxation and certain minor police regulations. According to their theory and construction of the act, nothing else is saved to the state. It is the exercise of a function of government pure and simple, and any interference therewith and any suit brought by reason thereof is an assault upon the sovereign power of the United States.

(a) As to suits against company.

The effect of this doctrine, of course, would be that no employe of the telephone system would have any right of action for injuries received against the telephone company, during the period of federal operation, because his action would necessarily be brought against the Government, and the Government has not consented to be sued with respect to such injury.

No claim, we suppose, will be made that the postmaster general has any right to give his consent that the Government of the United States may be sued. On the contrary, we suppose it is established without question that such suit must receive formal authorization by Congress before it can be brought. This is established by repeated decisions.

39 *Cyc.* 776.

"Consent by the United States to be sued must be evidenced by an act of congress, and government officers cannot waive its privilege in this respect, or lawfully consent that such a suit may be prosecuted so as to bind it."

Stanley v. Schwalby, 162 U. S. 255.

Head Note 1: "Neither the Secretary of War, nor the Attorney General, nor any subordinate of either, is authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers."

This being the situation, it becomes interesting to see what construction the parties themselves have put upon the character of federal possession and control. We find at page 14 of the compensation agreement between the postmaster general and the American Telephone & Telegraph Company, of which some of the defendant companies herein are a constitutent part, and to which they have expressly consented and agreed to be bound, that it is provided that the postmaster general—

"shall also pay or save each such Company harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or of anything done or omitted in the possession, operation, use or control of its property during the period of Federal control, except judgments or decrees founded on obligations of such Company to the Postmaster General or the United States."

This can only be construed as an express recognition that the character and quality of federal operation and control is such that actions and proceedings may still be brought against the corporation, because it recognizes the possibility of judgments on causes of

action arising out of things "done or omitted in the possession, operation, use or control." Such causes of action are not *created* by the agreement between the telephone companies and the postmaster general, because the postmaster general has no power to give his consent that the Government should be sued. Consequently, this can only be construed as an express recognition of continued liability to suit by the telephone company during the period of federal control, the same as previous to such control.

(b) In doing things necessary to preserve franchise rights.

Going further, we find that subdivision (f) provides:

"The Postmaster General shall save each Constituent Company harmless from any and all liability, loss or expense resulting from or incident to any claim made against it growing out of anything done or omitted during the period of Federal control in connection with or incident to operation or existing contracts relating to operations, and shall do and perform so far as is requisite during the period of Federal control for the protection of such Company all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by such Company of any of its property rights, ordinance rights, or franchises, or of its connecting or other contracts involving a facility of operation. The Postmaster General shall also save each Constituent Company harmless from any and all claims for breach of covenant heretofore entered into by it or by any predecessor in title or interest in any mortgage or other instrument in respect of insurance against losses by fire.

"Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Postmaster General of, or to make him liable on, any obligation of any such Company to pay a debt secured by a mortgage."

Note particularly, the postmaster general—

"shall do and perform so far as is requisite during the period of Federal control for the protection of such Company all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by such Company of any of its property rights, ordinance rights, or franchises, or of its connecting or other contracts involving a facility of operation."

We contend that here again we have an express recognition of preexisting regulations of rates. This proposition is well illustrated by the situation existing, or that might have been held to exist, in the case of *Home Telephone Co. v. Los Angeles*, 211 U. S. 265. There a franchise was granted to the telephone company for fifty years—

"to be enjoyed in accordance with terms and conditions named, stipulates for certain free service for the city, and the payment to it, after five years, of two per cent of the gross receipts, and provides that the charges for service shall not exceed specified amounts."

In other words, here was a situation such as the agreement contemplates, one where "during the period of Federal control," the postmaster general expressly obligates himself to "do and perform * * * all and singular the things * * * necessary and

appropriate to prevent * * * the forfeiture or loss by such company of any of its property rights, ordinance rights, or franchises," which we think is equivalent to saying that the postmaster general expressly agrees to be bound by the previously existing municiapl regulations of rates, because he expressly agrees to do during the period of Federal control whatever is requisite to preserve the company's franchise, and one of the things so requisite to be done obviously is the matter of not attempting to infringe or exceed the provisions of the ordinance or franchise relative to the maximum rates of toll to be charged.

2. Contemporaneous and practical construction by failure to assert power of regulation durthe war.

This legislation has received both contemporaneous and practical construction by the official to whom its execution was intrusted. The law was enacted at no ordinary time in our national life; it was written and enacted and received its construction at the very crux and crisis of the war. Doubt and division were gone. A majestic people stood ready, if need were, "to take all the old sanctions of the law and the constitution and fling them to the winds," rather than see its determined purpose crossed and its brave armies beaten. The times called for action—immediate, decisive—for the exertion of every utmost shred of power, "needful or desirable" in the language of the resolution, for the national security or defense.

That was the one sole sustaining, permeating purpose of the law. Necessity stood at its flood tide then, and here was a charter of power to be read and acted upon in the flaring light of war that leaped and flamed its illumination of every nook and corner of legislative purpose. A day then might crystalize a policy as effectively, might give by practical construction a reflection of the power intended to be conferred, as decisively as a decade or more might do in normal times. And what do we find when the emergency was on, when the hour of anguish and anxiety and travail had struck? Was there any effort to exercise the power now asserted? Not at all. And this alone, we submit, is such definite, decisive and final demonstration of the true intent, purpose, and meaning of the act as to forever set at rest any question of its scope or purview. The postmaster general having decided when the war was on that the assumption of the rate making power was neither needful nor desirable for the national security or defense, he cannot now in these "weak piping times of peace" seek to assert a power which his own construction of the act at a time when such construction was decisive has forever set outside the bounds of legislative purpose.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

Dakota Central Telephone Company, a Corporation, Northwestern Telephone Exchange Company, a Corporation, Interstate Telephone Company, a Corporation, and South Dakota State Telephone Company, a Corporation,

Plaintiffs in Error,

vs.

State of South Dakota, ex rel. Byron S. Payne, as Attorney General, and John A. Murphy and F. W. Dougherty, as and Constituting the Board of Railroad Commissioners of the State of South Dakota,

Defendants in Error.

MOTION TO DISMISS.

GEORGE M. PAYNE,

CHARLES A. ...

Attorneys for Defendants in Error.

April 29, 1919.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

Dakota Central Telephone Company, a Corporation, Northwestern Telephone Exchange Company, a Corporation, Nebraska Telephone Company, a Corporation, and South Dakota State Telephone Company, a Corporation,

Plaintiffs in Error,

vs. No 967.

State of South Dakota, ex rel., Byron S. Payne, as Attorney General, and John J. Murphy and P. W. Dougherty, as and Constituting the Board of Railroad Commissioners of the State of South Dakota,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF OF DEFENDANT IN ERROR.

THE ISSUES.

By writ of error and writ of certiorari, the plaintiffs in error have brought this case into this Court to review the judgment of the Supreme Court of the State of South Dakota, rendered March 4, 1919, permanently enjoining the defendant telephone companies from putting into effect, charging or collecting for long distance or toll messages between stations within the state of South Dakota the toll rates which the defendants had proposed to establish and make effective on the 21st day of January, 1919, and also permanently enjoining the defendants from establishing within the state of South Dakota any toll rates for long distance telephone messages in excess of rates approved by the Board of Railroad Commissioners of that state.

The defendant Dakota Central Telephone Company and the South Dakota State Telephone Company are corporations organized and existing under the laws of South Dakota. The

defendants Northwestern Telephone Exchange Company and the Nebraska Telephone Company are foreign corporations duly authorized to transact business within and pursuant to the laws of South Dakota. All of the defendants are and for some time past have been, engaged in operating telephone exchanges and long distance lines and in transmitting toll or long distance messages between points within the state, for which they have been collecting rates established or approved by the Board of Railroad Commissioners, pursuant to the state laws. In this case there is no dispute that under the laws of South Dakota telephone companies are prohibited from increasing rates for intra-state telephone service, unless the proposed increased rates are first approved by the Board of Railroad Commissioners. There is no dispute that in the plan for making the proposed toll rates effective, the laws of South Dakota and the authority of the Board of Railroad Commissioners were entirely ignored and disregarded; and that the rates proposed would increase the established charges for intrastate toll messages by reason of the fact that such rates would be in many instances higher in amount than the rates previously in effect, and by reason of the further fact that the plan for the new rates contemplated new classifications of toll service which would result in increased toll rates. There is no dispute as to what is the state law, or as to what it provides, or as to the authority of the Board of Railroad Commissioners thereunder; and the construction of the state laws is not in any wise involved in this case. The case was submitted to the state Supreme Court for final decision upon the pleadings, upon the theory of both parties that there was no material controversy as to any question of fact.

The contention that the laws of South Dakota need not be complied with when the Government of the United States operates the telephones and attempts to control the rates thereof was decided adversely to the plaintiffs in error by the Supreme Court of South Dakota in this case. The opinion of the court does not contain a positive declaration upon that point, but necessarily the court's conclusion that the defendant in error was entitled to the injunction leads to the inference that in the court's opinion the laws of South Dakota still govern the defendant telephone companies with reference to their intrastate rates. More ac-

curately stated, perhaps, the opinion of the state court was that, even if the property of the defendants has become the property of the United States, and if the Government of the United States is operating this property, still "the Government's title thereto is encumbered by the reserved power of the state to regulate intrastate rates." That conclusion of the court is based upon its construction of the joint resolution of Congress of July 16, 1918, to which reference is hereinafter made.

The theory upon which the defendant in error brought this case against the telephone companies is that they are wrongdoers and stand in the position of trespassers proposing to invade and violate the exclusive realm of the state's jurisdiction, as declared and defined by the law of the land; and that, therefore, in the making of state rates, the Government of the United States cannot be said to be operating or controlling the property of the telephone companies in South Dakota. The argument that, under the laws of the state, the Board of Railroad Commissioners has no authority over the Government of the United States in the operation of telephones, assumes that the Government is engaged in their operation and control in the particular respect under investigation. To concede that proposition is to concede that the Government of the United States is rightfully exercising control of telephone companies in South Dakota in the making of intrastate rates. That is the ultimate question for determination in this case. If in establishing the proposed rates the President or the Postmaster General or the telephone companies are acting wholly without authority, then it follows that they are wrongdoers or trespassers and that in asserting its right to continue to regulate the rates for service within the state the defendant in error is not undertaking in any wise to regulate the Government of the United States or to regulate the telephones with respect to any phase of their operations under the control of the Federal government. This subject is more fully discussed at another place in this brief.

The ultimate question presented in this case is as to whether the laws of South Dakota are controlling under the facts of the case, or whether they have been superseded by any valid enactment of the Federal Congress, or by any lawful action of the President or Postmaster General, pursuant to Federal legislation.

The answer of the telephone companies is mainly one of confession and avoidance. Leaving for later consideration the question of the jurisdiction of the state Supreme Court, or of any court, to determine the questions of law presented, we find that the position of the plaintiffs in error is that the laws of the state of South Dakota prescribing the manner in which advances in telephone rates may be made effective within the state, cannot apply, because the Congress of the United States, by a joint resolution passed July 16, 1918, authorized the President of the United States, during the war, to take possession and assume control of and to operate, the telephone systems of the country; because on July 22, 1918, the President of the United States issued a proclamation declaring that on August 1, 1918, the telephone systems throughout the United States should be conclusively deemed to be under Federal control and vesting the management and operation of such systems in the Postmaster General; because thereafter the Postmaster General on August 1, 1918, took possession and undertook to manage and operate such telephone systems, and thereafter entered into contracts with these defendants and other telephone companies prescribing their compensation and certain terms and conditions under which he would operate them; and because, thereafter, on December 13, 1918, pursuant to the powers vested in him, the Postmaster General promulgated his Order No. 2495, Telegraph & Telephone Service Bulletin No. 22, prescribing the rates and the classifications applying in connection therewith, which the defendant telephone companies, as his agents and instrumentalities, proposed to put into effect in South Dakota on January 21, 1919. A copy of the contract between the Postmaster General and the Dakota Central Telephone Company dated the 23rd day of November, 1918, was attached to the answer, marked Exhibit B and made a part thereof, and it was alleged that similar contracts had been entered into with the Nebraska Telephone Company on October 14, 1918, and with the Northwestern Telephone Exchange Company on October 19, 1918; but that no contract had been entered into between the Postmaster General and the Defendant, South Dakota State Telephone Company. (Tr. of Record, Page 22.)

Whether or not the Postmaster General was authorized in any sense by the joint resolution of Congress passed

July 16, 1918, to establish intrastate telephone toll rates in South Dakota depends, firstly, upon the proper construction of that resolution; and, secondly, if it shall be determined that the resolution purports to grant to the Postmaster General that authority, then, upon the question of the power and authority of Congress, under the Constitution of the United States, to enact a statute vesting such power in the President or the Postmaster General.

POINTS

In this brief the defendant in error urges the following points:

1. Congress did not, in the Joint Resolution of July 16, 1918, attempt to deprive the State of South Dakota of the right to regulate intrastate rates of telephone companies. On the contrary, it expressly reserved to the state the right to continue its regulation of such rates, by means of its lawful police regulations. (1) The conditions existing and the state of the law in effect when the Resolution was passed; (2) the purposes sought to be accomplished by its passage, and (3) the language in which it is expressed, support this construction of the Resolution.

2. Congress was without power, under the Federal Constitution, to delegate intrastate rate making power to the President or the Postmaster General because such rate making is one of the inherent police powers of the states, and because the delegation of such power was not necessary and proper in carrying out any constitutional authority of Congress, the President or any Federal Officer. (1) Under the Commerce Clause, it is not possible for Congress or the President to interfere with state rate regulation except to remove unjust discrimination against *interstate* commerce; (2) Under the war powers, Congress or the President cannot exercise arbitrary power unrelated to war purposes; (3) Rate making is a legislative function which Congress was powerless to delegate to the President by means of the Joint Resolution of July 16, 1918.

3. The Supreme Court of South Dakota had jurisdiction. The suit is not one against the United States, the President or the Postmaster General; and its purpose was not to control revenue or property of the United States. The defendants are wrongdoers, and cannot defend upon the ground that they acted under orders which the Presi-

dent or Postmaster General was without authority to issue.

4. It is within the power of the courts to determine the limits of executive authority, and to restrain acts in excess thereof. Assertion of authority by an officer attempting to exercise it does not preclude the courts' jurisdiction to determine its existence. This suit is not one to control administrative discretion, but to restrain acts in threatened violation of law and in excess of legal authority.

ARGUMENT AND AUTHORITIES

1. Congress did not, in the Joint Resolution of July 16, 1918, attempt to deprive the State of South Dakota of the right to regulate intrastate rates of telephone companies. On the contrary, it expressly reserved to the state the right to continue its regulation of such rates, by means of its lawful police regulations. (1) The conditions existing and the state of the law in effect when the Resolution was passed; (2) the purposes sought to be accomplished by its passage, and (3) the language in which it is expressed, support this construction of the Resolution.

The joint resolution of Congress is the source from which the President and the Postmaster General derives the powers which the defendant telephone companies contend that the Postmaster General exercised in requiring them, as his instrumentalities, to put into effect and collect the toll rates and classifications of service specified in his Order No. 2495, of December 13, 1918. This resolution is as follows:

Joint Resolution July 16, 1918

"The President, during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided that just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person

entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five, of the Judicial Code: Provided further, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems. (July 16, 1918, c.—, 40 Stat.)"

Construction of the Joint Resolution

This enactment is to be construed according to the general rules for the construction of statutes. The determination of this case is almost entirely dependent upon the construction which the Court shall make thereof. The defendant in error contends that, under the second proviso in the said resolution, the President and the Postmaster General are prohibited from establishing intrastate telephone toll rates, and from in any manner interfering with or impairing the authority of the state of South Dakota or of its Board of Railroad Commissioners in the exercise of the lawful police regulations of the state to regulate intrastate telephone toll rates as completely as at any time in the past, except that any regulations of rates which the state, or its Board of Railroad Commissioners, might undertake to enforce must not affect the transmission of Government communications or the issue of stocks and bonds by the telephone companies. It is the firm conviction of the defendant in error that this construction of the resolution is supported, (1) by a consideration of the circumstances and conditions existing long prior to and at the time of passage of the resolution of July 16, 1918, based on settled principles of law as declared by the Supreme Court of the United States in decisions upholding the power and authority of the states in the exercise of their police powers to regulate and control intrastate rates of public utilities; (2) by a consideration of the purposes sought to be accomplished by

the resolution; and (3) by a careful consideration and analysis of the context of the resolution itself.

(1) What were the circumstances and conditions existing when the resolution was passed, in so far as the same shed any light upon the question as to whether or not Congress intended to authorize the President to control intrastate rates? It is well known that telephone companies, almost without exception, have received their charters from the several states, and that from the beginning their functions have partaken of the nature of those of common carriers; that they have been subject to state laws controlling their rates, practices and property, upon the theory that their business is one affected with a public interest, and that it is, therefore, like the business of railroads, express companies, ferries, wharfingers and others, a business in which the public has such an interest that it may, through its political government, control the conduct thereof in the interests of the general public. Telephone companies, as is well known, have been granted the important right of eminent domain, as well as the right to construct their lines upon and along public highways, streets and public property. These are rights which the states, and not the National government, have conferred upon them.

It is a matter of common knowledge that under this system, during the past few years, there has taken place a marvelous development of the telephone as a means of communication. Large companies have grown up and extended their operations over the entire nation. Small companies have been organized and have met the needs of small communities. Telephone lines have reached into communities far removed from the populous centers of business activities, and have met the social and the business needs of nearly every citizen of the country, for speedy and convenient means of communication.

The only regulation of telephone companies in the past has been regulation by the states. The Interstate Commerce Commission has jurisdiction over interstate telephone rates but it has never exercised such jurisdiction. Many times the courts of the several states and of the United States have been called upon to consider state regulation of the telephone business. Questions of service, questions of rates, and many other questions upon which state legislatures or state regulating commissions have acted, have been

presented to the courts for review. Invariably the courts have sustained the right of states to prescribe such regulations under their police powers.

The making and regulating of the rates of common carriers with respect to their intrastate operations has always been upheld by the courts as an exercise of the police powers of the states.

Union Dry Goods Company v. *Georgia Public Service Corporation*, (U. S.) 39 Sup. Ct. Rep. 117.

Wis. ex rel., Attorney General, v. *C. & N. W. Ry. Co., et al.*, 35 Wis. 425, 559.

Munn v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77.

Arkansas Rate Cases, 187 Fed. 290.

Reagan v. *Mercantile Trust Company*, 154 U. S. 413, 38 L. Ed. 1028.

Williams v. *Arkansas*, 108 S. W. 838, 26 L. R. A. (N. S.) 482.

Minnesota Rate Cases, 230 U. S. 352, 57 L. Ed. 1511.

Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636.

3 Bouvier's Law Dictionary, page 2808.

Freund on Police Power, pages 65, 378, 385.

IX Encyclopedia United States Supreme Court Reports, pages 540, 541.

(2) What were the purposes Congress sought to accomplish by the passage of the resolution? This court will take judicial notice of the fact that on July 16, 1918, this country had been in a state of war for fifteen months. The end was not yet in sight. The Government was summoning every resource of the Nation for the conflict. The railroads had been placed under Federal control because of their collapse under the abnormal demands of war conditions. It had been the thought of Congress and the Administration that by unifying the railroads and operating them as a continental system, without reference to the interest of originating lines, by a free exchange of equipment and by a more extensive use of short line mileage, much of the expense and effort incident to transportation by competing railroads could be eliminated, and a great increase in the efficiency of operation would result. Whether the same considerations controlled Congress in passing the resolution

of July 16, 1918, or not, it is impossible to say, for the reason, as is well known, that the public has never been told, and does not now understand, the reasons which induced the Federal Administration to request Congress to grant it authority to seize telegraph, telephone and cable lines. There was, of course, the probability that the telephone lines might collapse as the railroads had collapsed under the excessive burden of the demands of the war. Congress had authorized the President to take control of the railroads by an act passed August 29, 1916, and Federal control was not assumed by the President until December 28, 1917. Therefore, in the case of the railroads Congress looked forward more than a year into the future, foreseeing possible conditions which might make Federal operation and control needful or desirable. Likewise when it passed the Resolution of July 16, 1918, Congress may have been looking into the future, aiming to anticipate conditions which might make Federal operation and control of the wire lines needful and desirable. The controlling purposes of Congress, therefore, was to unify and utilize the telephone lines and property for the purposes of the Government in the event of an emergency such as that which arose and paralyzed the railroads of the country. Viewed in the light of the experience of the country during the last two years, there is reason for believing that centralized operation of utilities, such as railroads, express and telephone companies, might be advantageous to the Federal Government while actually conducting war. However, we submit that there is nothing in our experience to indicate in any way that the control and regulation of intrastate rates of public utilities has ever been in any way needful or desirable as an aid to the Government in the prosecution of war, except in so far as this regulation has always been limited in the sense that regulating commissions could not, without violating the Federal Constitution, require public utilities to perform a public service for a rate insufficient to insure it an adequate compensation. It cannot be doubted that under state regulation of telephone companies and of their rates, these companies had developed and extended their operations. The rates which they had in effect when the Resolution of Congress was passed had in many instances been established after, and as a result of, exhaustive investigations by bodies of men authorized by law and informed by

experience in the consideration of the questions growing out of rate regulation. In very many instances those rates had received the approval of the courts. Rates established under such circumstances were entitled to the presumption that they were reasonable and fair. The purpose, therefore, of Congress in passing the resolution could not have been primarily, or even incidentaly, to enable the telephone companies in time of war and stress to increase their earnings. It cannot be doubted that the controlling consideration with Congress in authorizing the President to control and operate the telephone systems of the country during the war was to enable him to use them to facilitate the handling of Governmental business, to the exclusion of private or commercial business, and otherwise to coordinate their facilities with other facilities under the Government's control for the more efficient and effective conduct of the Government's vast business of war. We submit that the regulation of the telephone companies' intrastate rates bears no remote relation to this controlling purpose and that the members of Congress who voted for the resolution and who discussed it in the houses of Congress were not of the view that in passing the resolution they were authorizing administrative officers of the Federal Government to invade the domain of states' rights or to deprive the several states of the important powers which they possessed for the control and regulation of purely domestic affairs.

(3) What does the resolution, and particularly the second proviso therein, mean? After authorizing and empowering the President, when necessary for the National security or defense, to take possession, assume control and operate telephone companies for the duration of the war, and after providing means by which the just compensation of the telephone companies for the use of their property by the Government of the United States should be determined, Congress added the following proviso:

"Provided further that nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

This proviso unquestionably indicates that Congress,

in passing the resolution, gave consideration to the question of the power and authority of the states in the regulation of these utilities, under our National system of political organization. After enacting that the paramount purpose of the Government was to have its communications transmitted without state interference, and after providing that the issue of stocks and bonds by the telephone companies should be free from restrictions, imposed by any state, Congress declared that the laws, powers and police regulations of the states were to be not otherwise amended, repealed, impaired or affected by the act.

If Congress had intended that the President should have the authority to initiate rates for telephone, telegraph, cable or radio systems, it could very easily have said so. When Congress passed the Federal Control Act of March 21, 1918, it authorized the President, under certain conditions, to initiate rates. The omission of a corresponding provision from the resolution authorizing the President to assume control and to operate the telephone companies, very clearly indicates that the intention of Congress was not to confer upon the President the power to initiate telephone rates. Evidently it was not the view of Congress that the power to initiate rates was in any wise a necessary incident to the control or operation of the telephone lines and systems of the country during the war in the interests of National defense. When Congress had conferred upon the President power to consolidate and coordinate the operation of the several telephone systems, and the telephone systems with the telegraph, cable and radio systems, Congress was satisfied that it had accomplished the purpose for which Federal control and operation should, or could be, undertaken. Having done this much, and having provided in addition thereto for the method of determining the compensation that should be paid telephone companies and other wire companies, it then inserted the concluding proviso to indicate its intention that nothing in the resolution should constitute any authority, which the President could exercise, to amend, repeal, impair or affect the lawful police regulations of the several states, except that such regulations might not interfere with the transmission of Government communications or the issue of stocks and bonds.

Construction of "Lawful Police Regulations."

This controversy centers upon the construction of the

words "lawful police regulations," as used in this proviso. The plaintiffs in error contend that these words are to be interpreted in a limited sense so as to reserve to the states only such powers as they might possess for preserving and protecting the health, morals and safety of the public. The defendant in error, on the other hand; contends that this language is to be interpreted in the broad sense in which police regulations and police powers have been used and defined by the courts in many cases in which they have considered the nature of the power exercised by the states in the regulation of the property, affairs and rates of public utilities.

In its decision the Supreme Court of South Dakota expressed very appropriately its understanding of the term "lawful police regulations" as used in this proviso, as follows:

> "It cannot be doubted that the powers of a state to regulate the issuance of stocks and bonds by corporations created under its authority is a power entirely foreign to and outside of those powers included in the term 'police power' when such term is used in its narrow sense as referring to the power to preserve public safety, health and morals. Therefore, when Congress declared that the 'police powers of the several states' left to the states, should not 'affect the issue of stocks and bonds' of telegraph and telephone companies, it is clear that it had in mind reserving to the states 'police regulations' which, if unrestricted, might affect the issue of stocks and bonds. Thus Congress has by the very wording of this proviso declared that it reserved to the state, subject to two limitations, the full police powers which the states possess as sovereign states. The term 'lawful police regulations' is, therefore, self-interpreted by Congress and needs no interpretation by the courts."

In placing upon the exercise by the states of their police regulations the limitations that the same should not affect the transmission of Government communications or the issue of stocks and bonds it is clear that Congress did not have in mind merely regulations made for the preservation of health, safety or public morals, because regulations of that character could not possibly seriously affect transmission of Government communications or the issue of stocks and bonds. When it provided these limitations upon the

lawful police regulations of the states it had in mind regulations which the states might make, of a character which might naturally and appreciably affect the Government's use of wire lines or the issue of securities by the telegraph and telephone companies. It should be perfectly plain to everyone that what Congress had in mind, and what Congress foresaw, was the possibility that a restrictive policy of rate regulation by the states might impair the credit of wire lines to such an extent that the issuance of their stocks and bonds could not be made with reasonable assurance of finding a favorable market. Because lawful police regulations is a term sufficiently broad to comprehend, not only rate regulations, but service requirements, Congress added the provision that such regulations should not affect the transmission of Government communications. An unwise policy in the regulation of rates by states might result in such a depletion of the revenues of wire lines as to prevent the proper maintenance of such lines; or unwise requirements as to the furnishing of service and facilities for the public might interfere with the proper and necessary use of such lines by the Government for the handling of official communications. Congress, therefore, placed a limitation upon the exercise by states of the lawful police regulations in the control of service facilities and rates so that the handling of the Government's business might be in every way facilitated. Such a purpose was entirely consistent with the main purpose of the Government in asking for control and operation of the wire lines during the war; and that purpose, as stated before, was to place the property and facilities of the wire systems under the centralized control and operation of the Government, in order that the Government's business of every kind might be handled in the most efficient monner. These considerations led the Supreme Court of South Dakota, and have led the defendant in error, to the obvious conclusion that Congress, in placing these two limitations upon the exercise of the state's police regulations unquestionably regarded the lawful police regulations of the states as those broad powers which the states for many years had been exercising in their regulation of the properties and the rates of telephone and other wire companies. If Congress had been of the view that the term "lawful police regulations" was used in the resolution in the narrow sense in which the plaintiffs in error in this case contend

that it was used, then certainly Congress would not have said that such regulations should be limited so as not to affect the transmission of Government communications or the issue of stocks and bonds by the telegraph, telephone and other wire systems.

The first proviso in the resolution prescribed the means by which the just compensation to be paid to the wire systems should be determined for the supervision, possession, control and operation thereof by the President. Therefore and thereafter the Postmaster General, acting for the President, entered into contracts with three of the telephone companies who were made defendants in this case, in which the basis for such compensation was agreed upon. When Congress authorized the President to guarantee just compensation to the owners of these properties, Congress intended that the President should exercise such powers, and that thereby the Government of the United States should assume the obligation of paying for its possession, control and operation of the wire lines, such an amount or amounts as the President should deem to be just. When these agreements were entered into the telephone companies were no longer interested for the time being in the amount of the rates to be charged for their services. It is true that Federal control and operation was to continue only during the war and not byond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace. Therefore, the telephone companies would be greatly interested in the rates and classifications of their service in effect at the time of the termination of Federal control, but during Federal control the Government was to guarantee just compensation. How the Government should make good its guaranty was a matter of fiscal policy and not a matter of control or operation of the telegraph or other wire lines. In making such a guaranty the Government assumed an obligation, just as it has assumed many other obligations during the war, which it will be obliged to pay by revenues derived from one source or another. It is certain, at least, that the efficiency of Governmental supervision, control or operation of the telephone systems was not in the remotest degree dependent upon the manner in which the Government should raise the money to make its guaranty good. To say or to contend, therefore, that by the joint resolution Congress ever intended that the President or the Postmaster

General, or any one else charged with the actual operation of the wire lines during the war should have the power to reclassify the service and increase the rates and charges of such companies, and in doing so to deprive the states of those sovereign rights and powers which they have exercised from the beginning of telephone regulation in the interests of the public, is to argue to a conclusion wholly unsupported by the premises.

It was not necessary in the resolution of July 16, 1918, for Congress to determine the manner in which the Government should raise the funds to meet the guaranty which the President might make to the owners of wire lines for their use during the period of Federal control. That was a question which Congress could, and which Congress can, determine at a later date. Congress did not say in the resolution that the funds to meet that guaranty should be raised by rates to be established by the Postmaster General. That, however, is the provision which the plaintiffs in error are now undertaking to read into the resolution by construction and interpretation. That is the only basis for their contention in this case that the President or the Postmaster General has, or ever had, any authority to increase or otherwise regulate the rates or charges of telephone systems under Federal control.

It is conceded, and it will not be necessary to argue the proposition, that the resolution of July 16, 1918, is in no sense a revenue measure. It was not passed with the legal formalities necessary in the passing of a revenue law. Nevertheless, if the resolution means all that the plaintiffs in error contend that it means, it is a revenue measure, because, under their interpretation of it, it authorizes the collection of revenues with which the Government shall make good its guaranty of just compensation to the owners of the wire lines under its control.

If considered in its natural and most easily understood significance, the language contained in the concluding proviso of the resolution is most strikingly plain. It is not necessary to invent any complicated construction of this language. It says that the lawful police regulations of the states shall not be affected. It was passed at a time when, under their police powers and by means of police regulations, the states had been exercising effective control over telephone companies for years.

It is a most natural assumption that if Congress had intended to completely revolutionize these conditions and the relations of the states to these utilities which they had created, Congress would unquestionably have made that intention very clear by appropriate language in the resolution. If Congress had believed that it possessed the power to deprive states of the right to exercise police powers it is natural to assume that it would have said so in language that could not be misunderstood. Instead, however, of expressing any such belief Congress provided "that nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the state in relation to * * * the lawful police regulations of the several states." Congress could not have used language indicating more clearly its purpose to recognize the admitted right and authority of the states to continue as theretofore to control telephone companies through *lawful police regulations*. The only possible question that can arise in this connection is as to whether or not the term *lawful police regulations* embraces the control and regulation of intrastate rates of telephone companies. If the term *police powers* had been used in the resolution there would be no question that that term comprehended rate regulation; but the contention has been made that *police regulations* is a narrower term than *police powers*. The question is: What did Congress intend to do? If it be granted, as we believe it must, that Congress intended to recognize and preserve the states' rights under their police power to regulate telephones with respect to their intrastate operations, as they had regulated them up to the time of passing the resolution, then it must follow necessarily that "lawful police regulations" means and includes the power to prescribe and regulate intrastate rates. There was no reason why Congress should recognize the authority of states over telephone companies at all, except that Congress must have been cognizant of the constitutional limitations upon its powers to take away police powers of the states. Therefore, it used language in the resolution appropriate to express and define the known limitations of its powers. It said, in effect, that nothing in this act shall authorize the President to enter the realm of state regulation of these utilities. There was no occasion for inserting the term *lawful police regulations* in the resolution, except to assert thereby that Congress proposed to

exercise only the recognized and conceded powers of the Federal government, and disclaimed any purpose to invade or to exercise any of the conceded rights or powers of the states to regulate telephone companies by virtue of their police powers.

This construction, based as it is upon the circumstances under which the resolution passed is amply supported by definitions which the courts have given from time to time to the terms *police powers* and *police regulations.* In the reported decisions of the courts these terms are used interchangeably and indiscriminately in many cases. If any distinction whatever is recognized it is that police regulations relate to the exercise of police powers and that through police regulations police powers are applied. We do not find in the books any authority for any other difference in the significance of these terms.

Wisconsin, ex rel., Attorney General, v. *Chicago & North Western Railway Company, et al.,* 35 Wis. 425, 591.

Cooley's Constitutional Limitations, 577.

In his work on Constitutional Limitations, at page 577, in speaking of regulations of the rates and business of public utilities by the states, Judge Cooley said:

> "The limit to the exercise of the *police powers* in these cases must be this: the *regulations* must have reference to the comfort, welfare or safety of society. * * * That is they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise."

The foregoing definition was approved by the Supreme Court of Wisconsin in *Attorney General* v. *Chicago & North Western Railway Company,* supra.

In 31 Cyc. 903, the definition of police regulation and regulations is as broad as any definition ever made of the term *police power.* It is there said:

> "Police Regulation or Police Regulations. The term which is used to define the power which resides in the states. In the plural, such provisions of law as are designed to protect the lives, limbs, health, comfort and quiet of citizens, and to secure them in the enjoyment of their property."

Police powers and *police regulations* are terms used to convey the same thought in the text of Freund on Police

regulations as impairments of obligations the author refers to regulation of railroad rates as an example of police regulation in the following language:

"It is not an objection to an otherwise valid *police regulation* that it makes the performance of a contract valid in its inception impossible. Thus the power of the state to *regulate railroad rates* is not defeated by the fact that the railroad company has made a contract * * * that it will not charge less than the rate fixed * * * by statute."

As one of the illustrations "of the power in the states to make regulations affecting commerce which are sustainable as regulations of police," Judge Cooley, in his work on Constitutional Limitations, page 851, cites in the notes railroad rate regulation cases, including *Attorney General v. C. & N. W. R. Co.*, supra, *Munn* v. *Illinois*, supra, and *Railroad Company* v. *Fuller*, 17 Wall. 560.

Other cases in which "police regulation" is used in the same sense as "police powers," include the following:

Smyth v. *Ames* 169 U. S. 466, 42 L. Ed. 819.

Hammer v. *Dagenhart*, 247 U. S. 251, 38 Sup. Ct. Rep. 529.

In Fuller on Interstate Commerce, at page 17, there is a discussion of the term *police power*. The text refers to the License Cases and contains a quotation from the decision of the United States Supreme Court in those cases as follows:

"What are the police powers of the state? These are nothing more or less than the powers of the Government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law or a law to punish offenses or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own borders, in every case it exercises the same power. * * * It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as is its power to pass health laws, except insofar as it has been restricted by the Constitution of the United States."

It thus appears that in the resolution of July 16, 1918, Congress used language which appropriately expressed its policy and its conviction, as a principle of Constitutional law, that the states should not, and could not, be deprived of their right to regulate the rates and charges of telegraph

and telephone companies for service performed wholly within the boundaries of such states. This is the view for which the defendant in error contends. This interpretation of the resolution is in no sense a forced construction. It is the natural and proper interpretation of this act when viewed from the standpoint of the circumstances surrounding its enactment or of the language in which it is expressed.

In the recent case of *Union Dry Goods Company* v. *Georgia Public Service Corporation*, reported in 39 Sup. Ct. Rep. 117, this court very plainly expressed its view that rate regulation by a state is an exercise of police power. The case was one in which the Dry Goods Company sought to restrain the public service corporation from collecting certain increased rates for electric light and power. The service corporation contended the rates which it proposed to charge had been authorized by the railroad commission of Georgia. The dry goods company proved that it had entered into a contract with the service company providing for the service at lower rates; and it contended that the advanced rates charged by the service company impaired the obligations of this contract, in violation of the Federal Constitution. In its opinion, this court said:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies *rate regulation by a state in the exercise of its police power*. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *German Alliance Ins. Co.* v. *Lewis, Superintendent of Insurance of the State of Kansas*, 233 U. S. 389, 407, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.
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> "Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that *reasonable rates, fixed by a state in an appropriate exercise of its police power*, are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the Railroad Commission."

The term "lawful police regulations" as it appears in the Joint Resolution has been construed in accordance with

the contention of the defendant in error in decisions rendered in the following, among other cases:

Public Service Commission of Indiana v. *Receivers of the Central Union Telephone Company*, decided in the Circuit Court in and for Marion County, Indiana, February 21, 1919.

State of Indiana v. *Indianapolis Telephone Company*, decided in the same court on the same day.

Commonwealth, ex rel., Attorney General, v. *The Bell Telephone Company of Pennsylvania*, decided in the Court of Common Pleas in and for Dauphin County, Pennsylvania, January 29, 1919. (See Appendix to this Brief).

People of the State of Illinois v. *Chicago Telephone Company, et al.*, decided in the superior court of Cook County Illinois. (See Appendix to this Brief).

State of Ohio v. *Ohio State Telephone Company*, decided in the Court of Common Pleas of Franklin County, Ohio, on January 25, 1919.

State of Mississippppi ex rel. Collins, Attorney General, v. *Cumberland Teleph. & Teleg. Co.* decided in the Supreme Court of Mississippi. (See Appendix to this Brief.)

It is true that the term "police regulations" is sometimes used in texts and opinions of courts in a limited sense, as applying only to regulations affecting public safety, public health and public morals. The same words are used, as the authorities referred to above and as many other authorities show, in the broader sense, including any and all regulations which the states make in the exercise of their police powers. A police regulation is an assertion or exercise of a police power; and under police powers the states may prescribe and enforce regulations which go beyond the preservation and protection of public safety, health and morals, and pertain to the general welfare and prosperity and to the control of persons and corporations engaged in conducting a business affected with a public interest.

Instead of the narrow construction of the words "lawful police regulations" for which defendants contend, and for which they must contend if their position is to be justified, we respectfully insist that a broad and liberal con-

struction should be made of these words and of the proviso in which they are contained, in order that the evident intention of Congress may prevail. The Joint Resolution, as a whole, is a grant of power by Congress to the President; the concluding proviso in the resolution is a limitation to that grant. It is usual that grants of power by legislation are strictly construed. Governments of enumerated and limited jurisdiction and officers, possessing only powers delegated by law, are, by the courts, invariably confined within the limits of the acts defining their powers and their jurisdiction. It is, therefore, under ordinary and well established rules of construction, very clearly the province of this court in construing the resolution in question, to interpret strictly that portion of the same which purports to grant powers and to construe liberally, with a view of effecting the purpose and intention of Congress, that part of the resolution contained in the proviso which limits the resolution as a whole.

Chesapeake & Potomac Tel. Co. v. *Manning*, 186 U. S. 238, 46 L. Ed. 1144.

It is not contended by the plaintiffs in error that the resolution contains any express grant of authority to the President to initiate rates for interestate or intrastate telephone communications, but it is contended, that inasmuch as the President was authorized to possess, control and operate telephone companies in such manner as he should deem needful or desirable, the inference necessarily follows that the President should control the rates to be charged. Considering the resolution as a whole it is plain that Congress intended the President to assume the position of a director and supervisor of the telephone properties, for operation during the war. By placing the operation of the different lines under a single management they become unified and coordinated. It was to be expected that a single control of all telephone lines would result in a more efficient and economical operation and in a more dependable and speedy service for the Government of the United States. It is reasonable to assume that Congress contemplated all of these results; but it is not reasonable to assume that by making the President the general supervisor of the telephone lines, Congress intended to confer upon him, except in the matter of facilitating Government communications, any greater rights in his relationship with the public than those

which the telephone companies themselves possessed. It is very evident, that the purpose of Congress was to place the Postmaster General in the shoes of the telephone companies in matter of rate making; that is, Power at page 583. Speaking there of the effect of police that he might increase interstate rates in the usual manner, and that he might procure increases of intrastate rates as the companies had always procured their increases, when they could justify the same. The necessity that the Postmaster General proceed as telephone companies had been theretofore required to proceed, with relation to their intrastate rates, could not possibly have interfered with the government operation, nor with any legitimate purpose of the Postmaster General. It has never, to our knowledge, been contended, and certainly is not contended in the record in this case, that the toll rates of the defendant telephone companies were inadequate when the Postmaster General assumed operation of their properties. It has never been contended, and certainly is not contended in this record, that if the defendants or the Postmaster General had required additional toll revenues for the operation of defendants in this state they or he could not have procured the same conveniently and speedily, if the same were warranted. We submit that Congress fully understood all of these considerations; and that its omission of any reference in the resolution to the rate making power was deliberate and intentional. Under such circumstances the courts ought not to read into the resolution a power which Congress did not attempt therein to confer upon the President. We cannot refrain from saying again that the circumstances under which the resolution was enacted, as well as the ends and aims sought to be accomplished, together with the circumstances arising since the Postmaster General assumed to operate the telephone properties, all combine in impelling us to the conclusion that Congress intended to preserve, and did preserve, to the states, their usual powers of intrastate rate regulation.

It is further contended by the plaintiffs in error that the term "police regulations" as used in the act is to be construed in the narrow sense in which those words are sometimes used and not in the sense of rate regulations as broad as police powers, for the reason that, although police powers of the states cannot be taken from them or delegated, never-

the less the rate making power can be delegated and that, therefore, rate making is not really an exercise of police powers. The decisions of the Supreme Court of the United States, and of many other courts, are squarely against this contention. Since the decision in *Munn* v. *Illinois*, *supra*, and in *Union Dry Goods Company* v. *Georgia Public Service Commission*, *supra*, there can be no doubt that rate making and rate regulation by states are attributable to police powers of the states. Plaintiffs in error illustrate their argument by calling attention to the fact that municipalities some times exercise rate making powers under authority of state laws. This is referred to as an example of the delegation of rate making power by states. A municipality is an agency of the state Government, and under well established authority, the state some times may delegate the exercise of its police powers to such municipality. However, the exercise of these powers by the municipality is always subject to the laws of the state and is always under the control of the state; and the delegation of these powers may be recalled from the municipality to the state government. On the other hand, the states have not delegated and could not delegate any such powers to the Federal Government, and if they did delegate them, could not recall them. In other words such a delegation as has ever been made by states of their rate making powers has not been in any sense a loss of control of the power delegated. Police powers that are exercised to preserve public peace, public health and public morals are likewise delegated to be exercised by municipal authorities, always under the control of and subject to recall by the state. We fail to see in the attempted distinction any difference in the nature of the police powers of the states when exercised to regulate the rates of common carriers, on the one hand, or when exercised to preserve peace, health and morals, on the other.

However that may be, of this we are certain, that it is wholly beside the question to argue that because municipalities exercise rate-making powers under authority of state laws, therefore, the Government of the United States may, with equal authority, regulate state rates, without the suggestion of any authority therefor delegated by the state. We respectfully suggest that the Federal government is not, and cannot be, fully cognizant of local needs and conditions; and that this case is an illustration of the impossibility of

action by the Federal Government with any regard for local conditions, because it is not even pretended in this case that the proposed rates were made to fit, or because demanded by, conditions within the state of South Dakota. Police powers are powers reserved to the states in recognition of the principle that local government can best be administered by local authorities. We believe that there is the same need of local rate regulation and supervision by local authorities when the business is carried on by the Federal Government as when carried on by telegraph or telephone companies whose properties extend over the entire nation.

This principle has been recognized by the Congress and by the Federal Courts when applied to railroads incorporated under Federal Law.

Smyth v. Ames, 169 U. S. 466.

Reagan v. *Mercantile Loan & Trust Co.*, 154 U. S. 413.

That the power to make and regulate rates of wire lines is a power which cannot inferred from any language used in the joint resolution, but must be positively conferred by unambiguous language, is a proposition which is abundantly supported by many authorities.

Reagan v. *The Mercantile Trust Company*, 154 U. S. 413, 38 L. Ed. 1028.

Omaha Street Railway Company v. *Interstate Commerce Commission*, 230 U. S. 324.

Interstate Commerce Commission v. *Louisville & Nashville Rr.*, 227 U. S. 88.

Georgia Railroad Company v. *Smith*, 128 U. S. 174, 182.

Interstate Commerce Commission v. *Railway Company*, 167 U. S. 479, 494.

Milwaukee Elevated Railroad Company v. *Wisconsin Railroad Commission*, 238 U. S. 174, 180, 49 L. Ed. 1254.

Home Telephone & Telegraph Company v. *Los Angeles*, 211 U. S. 265.

In *Reid* v. *People of the State of Colorado*, 187 U. S. 137, 47 L. Ed. 108, referred to in the opinion of the Supreme Court of South Dakota in this case, the court said:

"It should never be held that Congress intends to supersede or, by its legislation, suspend the exercise of the police powers of the states, even when it may do so,

unless its purpose to effect that result is clearly manifested."

Thus it seems to the defendant in error that if the joint resolution of July 16, 1918, is construed in the light of conditions existing and the settled principles of law at the time of its passage, or if it is construed with special reference to the purposes which it was intended to accomplish, or if construed by reference to the language contained in the resolution, the conclusion is unavoidable that what Congress intended to do, and succeeded in doing, was to reserve to the states their usual police powers to be exercised without impairment in any way for the regulation of the intrastate rates and fares of the telephone systems while under Federal control.

2. Congress was without power, under the Federal Constitution to delegate intrastate rate making power to the President or the Postmaster General, because such rate making is one of the inherent police powers of the states, and because the delegation of such power was not necessary and proper in carrying out any constitutional authority of Congress, the President or any Federal Officer. (1) Under the Commerce Clause, it is not possible for Congress or the President to interfere with state rate regulation except to remove unjust discrimination against interstate commerce; (2) Under the war powers, Congress or the President cannot exercise arbitrary power unrelated to war purposes; (3) Rate making is a legislative function which Congress was powerless to delegate to the President by means of the Joint Resolution of July 16, 1918.

The control by states of the rates of common carriers within their borders is attributable to one of the fundamental rights of the states, under our system of Federal Government. The purposes of the Tenth and others of the early amendments to the Constitution of the United States are so well understood, and the nature of the Federal Government as one of the enumerated powers is so well known that no discussion of these subjects is necessary in this connection; but these principles are controlling in this case because through their application in the decisions of our highest courts it has been established beyond question that the police powers of the states have never been conferred upon the Federal Government and have never been parted with

by the states; and that they remain under the exclusive jurisdiction of the states.

In *Cooley's Constitutional Limitations*, 7th Edition, page 831, it is stated that:

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. *Neither can the National Government, through any of its departments or offices, assume any supervision of the police regulations of the states.* All that the Federal authority can do is to see that the states do not, under cover of this power, invade the sphere of National sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the Nation, or deprive any citizen of rights guaranteed by the Federal Constitution."

The same principle is expressed as follows, in Volume 22 of the American and English Encyclopedia of Law, at page 919:

"The police power is inherent in the several states and is left with them under the Federal system of Government, and may always be exercised by the state legislatures. It follows that the Federal Government cannot exercise any police power within the several states, but it can exercise such power only where the authority of Congress excludes dominance of state legislation, as, for instance, in the District of Columbia where the police power of Congress is the same as that of the state legislatures within their several jurisdictions."

12 Corpus Juris, page 910.

2 Words and Phrases, page 1066.

Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

Civil Rights Cases, 109 U. S. 3.

Minnesota Rate Cases, 230 U. S. 352, 57 L. Ed. 1511.

In Volume 1 of *Roberts' Federal Liabilities of Carriers*, p. 36, it is stated that:

"The sole authority of the Federal Government during times of peace over common carriers within the states is contained in the commerce clause of the Constitution, which provides that Congress may regulate interstate and foreign commerce. The Federal Government may not,

therefore, regulate or control carriers engaged exclusively in intrastate commerce or even the intrastate business of interstate carriers; for all the attributes of a sovereignty not delegated to Congress by the commerce clause, have been retained by the states over common carriers operating within their borders, and they may exercise their power and control over all transportation exclusively within their boundaries to the same extent that the National Government exercises over transportation from one state to another and to foreign countries."

Congress Cannot Control Intrastate Rates Under the Commerce Clause

It appears to be the contention of the plaintiffs in error that the Postmaster General derived the power which he has attempted to exercise by means of Order No. 2495 to make intrastate rates, from the joint resolution of July 26, 1918, and also from the war powers vested by the Constitution of the United States in the President. We do not understand that it is contended that the resolution was passed in the exercise of the power of Congress to regulate interstate commerce, but if it is asserted that the commerce clause was authority for this resolution, a sufficient reply thereto is that the Supreme Court of the United States held in the *Minnesota Rate Cases*, 230 U. S. 352, and in the case of *Houston E. & W. T. R. Co.* v. *United States*, 234 U. S. 342, that under the commerce clause the United States Government cannot interfere with rates which are charged for service wholly within a state, except that in proper cases, and after sufficient investigation, the Interstate Commerce Commission may authorize common carriers to advance intrastate rates to the level of interstate rates in cases where this may be necessary, in order to remove unjust discrimination against interstate commerce. Except in this particular, the commerce clause does not authorize agencies of the National Government to control rates for intrastate transportation or service.

Congress, Under Its War Power, Cannot Control Intrastate Rates, Except When Necessary and Proper As a War Measure

If the joint resolution was passed by Congress in the exercise of the war powers of Congress, then as we shall presently show, it must appear affirmatively and not by in-

ference that it was necessary as a war measure to vest in the President authority to make intrastate rates for wire lines under Federal control.

It is asserted by the plaintiffs in error that under the war powers of Congress and the President, the Federal Government may exercise authority in derogation of the police powers of the states. It is urged with much emphasis in this case that the power which Congress exercised when it enacted the resolution of July 16, 1918, and the power which the President exercised through the Postmaster General when the latter issued Order No. 2495, on December 13, 1918, were the war powers of the legislative and executive branches of the Government.

Even if it should be granted for the purpose of argument that Congress, could, under Section 8, Article I, of the Constitution of the United States, vest in the President the authority to exercise police powers by regulating and controlling intrastate rates of telephone companies, still the language which Congress used in its resolution plainly indicates that Congress had no intention to grant any such power to the President; and that, on the other hand, by appropriate language it prohibited the President from in any wise amending, repealing, impairing or affecting the rights of the states to exercise their lawful police regulations, including the making of intrastate rates. But if the court shall be of the opinion that our construction of this language in the resolution is unwarranted, then the question of the power of Congress, under Section 8, Article I, of the Federal Constitution, to confer upon the President the right to make intrastate rates of telephone companies for service within the borders of the state of South Dakota, becomes a question of controlling importance.

There can be no doubt that the power of Congress, under the authority to declare war, to raise and support armies and to provide and maintain a navy, and to make all laws necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, is very broad, and must extend to any action of Congress which has any necessary or proper relation to the waging of war. Likewise the authority of the President as Commander in Chief of the army and navy, under Section 2, Article II, of the Constitution of the United States, is a

very extensive power and may be exercised by the President in any way necessary or proper to carry on war successfully It will be observed, however, that the language of the concluding paragraph of Section 8 of Article I of the Constitution, is that Congress shall have the power "to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

We contend that it is within the jurisdiction of the courts, and particularly of this court, to determine whether or not a law of Congress purporting to be necessary and proper for carrying into effect any provision of the Federal Constitution is, as a matter of fact, necessary and proper, and that the courts have jurisdiction to determine whether or not any part of the authority which Congress assumes to exercise under this provision of the Federal Constitution is necessary and proper for carrying into effect any of the powers vested in the Government of the United States. By analogy the conclusion cannot be avoided that the power and authority of the President of the United States, even as Commander in Chief of the army and navy, is not an unlimited power, and that anything which the President does upon the assumption that it lies within his power as Commander in Chief, or within powers conferred upon him by Congress, must be necessary and proper for carrying into effect powers vested in him by the Constitution. As in the case of enactments of Congress, so in the case of official acts of the President, it lies within the jurisdiction of the courts to determine whether the same are necessary and proper for carrying into execution any of his constitutional authority.

It is urged that the President is the sole judge of the necessity calling for the exercise of his war powers; and that his discretion is not reviewable by the courts. However, in a very early case, *Mitchell* v. *Harmony*, 13 Howard, 115, the Supreme Court of the United States said:

> "Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in the time of war. And the question here is whether the laws permit it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to take.

And we think it very clear that the law does not permit it."

In view of these considerations, the question arises whether or not the making of intrastate rates in South Dakota was necessary or proper to carry into effect any of the war powers vested in Congress or the President by the Federal Constitution. If such necessity existed, we submit that it does not appear in the present case, nor does it appear that the increases proposed in the telephone rates, arose out of war conditions, or that the increases in any way contributed to the National security of defense. The only possible necessity for increasing the revenues of telephone companies that does appear is the necessity for the raising of revenues to enable the Government of the United States to compensate the telephone companies for the use of their property. However, that is not a war purpose. Plainly, the concluding proviso in the resolution of July 16, 1918, indicates that in the opinion of Congress there existed no military necessity for increasing telephone toll rates.

Much emphasis is placed in argument of counsel for plaintiffs in error upon recitals contained in the proclamation of the President issued July 22, 1918, to the effect that, in his judgment, the assumption of Federal control and operation of wire lines was needful and desirable in the prosecution of the war. However, National operation and management of telephone lines and the making of intrastate rates for telephone companies are entirely different matters and in no wise necessarily related one to the other. The President did not proclaim that it was needful or desirable to increase intrastate telephone rates as a war measure. Neither did the Postmaster General, in Order No. 2495 recite that such increases in telephone rates were necessary, or that they contributed in any way to the successful prosecution of the war. (Tr. of Record, page 24).

However, if the president had declared, or if the Postmaster General had recited, that authority existed for increasing telephone rates in the manner proposed in Order No. 2495, such declaration or recital would not necessarily have determined the fact, and it would be the duty of the court in a proper proceeding to go behind such recitals, for otherwise it would be impossible to check the exercise of arbitrary power. Even if an administrative officer should act in entire good faith in declaring the possession of au-

thority which he did not possess, it would lie within the jurisdiction of the courts to enjoin him, if in fact he did not possess the authority claimed.

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94.
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 620.
Degge v. *Hitchcock*, 229 U. S. 162, 171.
United States v. *Lee*, 106 U. S. 196.

Therefore, if the President or Postmaster General had declared that the particular telephone toll rates involved in this case were necessary as a war measure, it would be the duty and within the jurisdiction of the court to review such a determination and determine whether as a matter of fact it was true. In this connection we wish to emphasize that we make a clear distinction between possession and operation of the telephone properties and the making of intrastate rates for the telephone properties. Possession and use thereof might be most necessary and desirable as a war measure, whereas the making of intrastate rates for the telephone service performed by means of such telephone properties would not have the remotest relation to any war purpose or war necessity. The relief sought in this case is not a judgment setting aside the Postmaster General's possession and operation of the properties of the telephone companies during the war, but is to restrain the telephone companies operating in South Dakota from changing and increasing established toll rates in that state in violation of the laws of the state, and without the semblence of any proof that the changes and increases proposed in the rates would contribute in the slightest degree to the success of the Government of the United States in the European war. The contention of the plaintiffs in error is that the President and the Postmaster General possess the power, because the President was authorized by the joint resolution of Congress to possess, control and operate the telephone lines during the war. They seek in vain in the resolution for any express grant of such power. They infer it, and ask the court by inference and construction to read such a power into the resolution and then contend that it should be called a war power.

If this court should be of the opinion that the language used in the joint resolution does not prohibit the President and the Postmaster General, as well as the telephone com-

panies operating in South Dakota, from interfering with or impairing the police reguations of that state, enforced in the form of regulations of intrastate toll rates, it will then be called upon to determine by what authority the President or the Postmaster General assumed to establish such intrastate rates. In times of peace it is established by all of the authorities that such power could not be conferred upon the President, except by Constitutional amendment. In time of war such powers could not be conferred upon the executive or one of his cabinet officers without justifying the same as a necessary exercise of war power. And we respectfully submit that the Postmaster General's Order No. 2495 does not contain upon its face or in any of the schedules or classifications of rates contained therein, anything whatever to indicate the necessity, desirability or propriety of the proposed rates as a means through which the interests of the United States in the war in Europe might be furthered.

Any Condition Making Intrastate Rate Control by the President, Necessary and Proper as a War Measure, Did Not Exist When Order 2495 Was Made, December 13, 1918

As a matter of fact it cannot, by any stretch of the imagination, be said that the proposed rates had any relation whatever to the war program of the Federal Government. The order in which these rates were promulgated was made on the 13th of December, 1918, 31 days after hostilities in Europe had ceased by the signing of the Armistice November 11, 1918. It is possible that, technically speaking, the war did not end on that date, but the conditions of the Armistice were such that the power of the enemy to resist further was ended and it was impossible thereafter for it to renew hostilities. On the day that the Armistice was signed, the President appeared officially before Congress to advise it as to the state of the Union, and then and there said:

"The war thus comes to an end; and having accepted these terms of Armistice it will be impossible for the German command to renew it."

In an official message delivered to Congress December 2, 1918, the President said:

"And now we are sure of the great triumph for which

every sacrifice was made. It has come, come in its completeness, and * * * we turn to the tasks of peace again, —a peace secure against the violence of irresponsible monarchs. * * * If the war had continued it would have been necessary to raise at least eight billion dollars by taxation, payable in the year 1919, *but the war has ended* and I agree with the Secretary of the Treasury that it will be safe to reduce the amount to six billions."

The Interstate Commerce Commission, which is a branch of the executive department of the Government of the United States, on January 20, 1919, in its decision in the case of *Pacific Lumber Company, et al.*, v. *Northwestern and Pacific Railroad Company*, 51 I. C. C. 738, said:

"We must notice that, as stated by the President to Congress, with the signing of the Armistice, the war thus comes to an end.

"We must notice that with suddenness and as of one accord the Nation has turned from the actual waging of war to the demobilization of military forces and the return of industries to their accustomed channels. No more than is necessary should war conditions be permitted to deprive any individual or locality of that equality of opportunity in respect to transportation which is insured alike by our fundamental economic policy and by the law."

It is, therefore, perfectly clear that if the President undertook to control telephones by virtue of the war powers of Federal Government, the fact is that the exercise thereof, which it is the object of this case to test, was not undertaken until a time had arrived when the highest authorities of the Federal Government itself acknowledged that the war had ended. These considerations have no bearing on the construction to be made of the joint resolution of Congress, but they have an important bearing upon the contention of the defendants in this case that the Postmaster General's Order No. 2495, dated December 13, 1918, effective January 21, 1919, has any warrant as a war measure.

On April 3, 1919, United States District Judge Walter Evans, in the District Court of the United States for the western district of Kentucky, decided the case of *United States v. Harry Hicks*. That was a case in which the defendant had been convicted of violating Section 13 of the Act of May 18, 1917. The defendant thereupon moved for a

new trial, and that judgment on the verdict be arrested, upon the ground that the facts proved did not show that any offense had been committed against any law of the United States. It became necessary for the court to determine whether or not Section 13 of the Act approved May 18, 1917, was in effect on the 7th day of December, 1918, when it was charged in the indictment that the crime had been committed at a place within five miles of the boundary line of Camp Zackary Taylor. The act contained the provision that:

> "The Secretary of War is hereby authorized, empowered and directed *during the present war* to do everything by him deemed necessary to suppress and prevent," certain acts named in the section "within such distance as he may deem needful of any military camp, station, fort, etc."

The court quoted from the President's address of November 11, 1918, and in a very able and exhaustive opinion came to the conclusion which it expressed as follows:

> "We know the war began on April 6, 1917. When did it end? On November 11th, as we have stated, the President communicated to Congress the express information that this 'tragic war * * * is at an end.' This status then ascertained and communicated to the Congress by the chief of the executive end of the military service of the United States Government should, we think, be accepted as accurate and final by the court in this case."

The court then concluded that the Act of May 18, 1917, which made criminal certain immoral conduct if committed "during the present war" was not effective on the 7th of December, 1918, because the war had then been officially proclaimed to be at an end.

This principle is of first importance in the instant case, because it shows that even if it should be conceded that Congress might authorize the President to change and increase South Dakota intrastate rates under the war powers of Congress and the President, still no attempt was made to exercise such power during the war or pursuant to any war purpose or in accordance with any plan for prosecuting the war. The Postmaster General did not promulgate his order until after all necessity for the regulation of such rates as a war measure had passed. It cannot be said,

therefore, that in promulgating the proposed toll rates on December 13, 1918, or in attempting to put them into effect in South Dakota, on January 21, 1919, the President or Postmaster General, or the toll lines in South Dakota, were exercising any power bearing any relationship whatever to war power.

Congress Cannot Confer Legislative Power Upon the President, to Make Rates for the Future

In many cases it has been decided that the making of rates for the future is a legislative function. It is one of the fundamental principles of Constitutional law in this country that Congress cannot delegate legislative powers to the executive department. Plaintiffs in error contend in this case that it is within the discretion of the President to determine what rates should be charged for transmitting toll messages between points within the several states. Clearly they are contending thereby that the President, either by virtue of the commerce clause or the war powers of the National Government, is authorized to exercise a purely legislative function. The joint resolution, unlike the Federal Control Act of March 21, 1918, applying to railroads, does not expressly authorize the President to initiate rates, does not provide that rates so initiated must be reasonable and does not provide, as does the Federal Control Act, for the review of any rates which the President may make either by the Interstate Commerce Commission or by the Courts. If the President has any authority whatever by virtue of the joint resolution to make rates he makes them as the plaintiffs in error contend here, *in the exercise of his discretion.*

It was pointed out in the case of *Field* v. *Clark*, 143 U. S. 649, that Congress cannot delegate legislative power. In its opinion, at pages 692 and 693, the Court said:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of Government ordained by the Constitution. * * * Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * He had no discretion in the premises, except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy estab-

lished by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the leglislative will, he exercised the function of making laws."

In this opinion the court pointed out this vital distinction:

"'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.'"

3. The Supreme Court of South Dakota had jurisdiction. The suit is not one against the United States, the President or the Postmaster General; and its purpose was not to control revenue or property of the United States. The defendants are wrongdoers, and cannot defend upon the ground that they acted under orders which the President or Postmaster General was without authority to issue.

Supreme Court of South Dakota Had Original Jurisdiction

This suit was instituted as an original action in the Supreme Court of the State of South Dakota, in the name of the state on the relation of the Attorney General, and its object was to prevent, by a writ of injunction, a threatened violation of its laws. The defendants were, under the definition of the state laws, common carriers operating under franchises granted by the state, and were threatening, under the alleged authority of Federal Government, to invade rights which the state believed that it possessed as one of the sovereign states of the Union. That the state had the right to proceed in this manner in the highest court of the state has been many times upheld by the courts.

Attorney General v. Ry. Co., 35 Wis. 425.
State of Wis. ex rel., Bollens v. *Frear, et al.*, 231 U. S. 616.
State v. Chicago, etc., R. Co., 88 Neb. 669.
Everett v. *Board of Commissioners*, 1 S. D. 365, 47 N. W. 296.

In the case of *State of Wisconsin, ex rel., Bollens*, v. *Frear, supra*, the Supreme Court of Wisconsin in an opinion by Judge Winslow, quoted with approval from the

opinion of Justice Smith in the case of *Attorney General* v. *Blossom*, 1 Wis. 317, as follows:

> "And, why was original jurisdiction given to the Supreme Court, of these prerogative writs? Because these are the very armour of sovereignty. Because they are designed for the very purpose of protecting the sovereignty and its ordained officers from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises again usurpation. * * * To preserve the liberties of the people, and to secure the rights of the citizens, the state must have means of protecting itself.'" * * *

Continuing his very interesting and able opinion in *State* v. *Frear, supra*, Judge Winslow, at the conclusion of his examination of former decisions of the court upon the same question, said:

> "The affirmative result of the significant cases since the Railroad Cases is, as it seems to us, that the original jurisdiction of this court may be rightly invoked when there is a showing made * * * that * * * (4) a law regulating public service corporations in the interest of the people is systematically disobeyed and set at naught."

It is contended by the plaintiffs in error that this is in effect a suit against the United States and that it cannot be maintained because the United States has not consented to be sued; that the suit attempts to bring into review a discretionary act of the executive department which is not reviewable by the courts; and that, for these reasons, the Supreme Court of South Dakota was without jurisdiction over the controversy.

This is Not a Suit Against Any Officer of the United States

It is the contention of the defendants in error that this is not a suit against the United States or one of its officers, and is not a suit against the property of the United States. This contention is based upon the proposition heretofore discussed that the joint resolution of Congress prohibits the President and the Postmaster General from interfering with the right of the state of South Dakota to regulate purely intrastate toll rates of the plaintiffs in error. If we are right in this contention then it follows that the telephone companies, Postmaster General and the President are mere trespassers and wrongdoers and that they are not

protected by any provision of the joint resolution in the unauthorized action which they proposed to take. If in the increasing and changing of the established South Dakota toll rates, the telephone companies, Postmaster General and the President acted wholly outside of their power, they were not engaged in performing any official act. In this view of the case an injunction interfering with them when so acting would not be an interference with the President as an official, or with any official action and, therefore, would not be against the Federal Government. Where the authority to do the act complained of is challenged, it cannot be said that the suit is against the United States.

Philadelphia Co. v. *Stimson*, 223 U. S. 605.
U. S. v. *Lee*, 106 U. S. 196.
Cunningham v. *Macon & Brunswick Rr.*, 109 U. S. 446, 452.
Tindal vs. Wesley, 167 U. S. 204.

This is Not a Suit Against the United States, Its Property, or Its Revenues

It is contended that this is a suit against the United States because it is a suit involving the property of the United States. It is urged that all property which formerly belonged to the telephone companies is now the property of the United States; and that the purpose of this action is to control the Government of the United States in its use and possession of the same. It is also urged that the necessary result of this suit is to interfere with the revenues to be received upon the proposed rates, which would be property of the United States.

These contentions are invalid under our theory of the case. Certainly it cannot be said that revenues to be received from rates which the telephone companies or the Postmaster General are unauthorized to make would be revenues or property of the United States. For the same reason this is not a suit to control property of the United States, when used in any lawful or authorized manner. It is a suit merely to control an unlawful, unauthorized and arbitrary proposed use of property. It is not legal use of the telephone property which is sought to be controlled by this action, but it is the proposed unlawful acts of the telephone companies that the defendant in error asks to enjoin. The United States was not made a party defendant because its property is not the subject of the suit, and no lawful order or

regulation of the United States or of any of its officers is involved. The only purpose of this suit was to restrain unauthorized and unwarranted acts threatened by the defendant telephone companies in violation of the laws of South Dakota. This is distinctly not a suit *in rem* but it is a suit *in personam* and the defendant telephone companies who proposed actually to take money from telephone users in South Dakota unlawfully were and are the only necessary parties defendant.

4. It is within the power of the court to determine the limits of executive authority, and to restrain acts in excess thereof. Assertion of authority by an officer attempting to exercise it does not preclude the courts' jurisdiction to determine its existence. This suit is not one to control administrative discretion, but to restrain acts in threatened violation of law and in excess of legal authority.

Courts Will Restrain Unauthorized and Unlawful Acts of the Officers and Agents of the Federal Government

Upon the authority of the decisions of the Supreme Court of the *United States in United States* v. *Lee, supra*, and in *Cunningham* v. *Macon & Brunswick Railroad, supra*, it cannot be doubted that it is the duty and within the jurisdiction of the courts, regardless of any assertion of authority by the President or the Postmaster General, and regardless of any reliance by the telephone companies upon any such an assertion of authority, to determine and adjudicate the fact as to whether or not the President or the Postmaster General possessed the authority claimed. These cases are equally controlling, regardless of the nature of the authority which an officer of the Government may maintain that he possesses. It is necessary that in exercising war powers the executive shall be confined within the limits of his authority and the courts will determine the question as to whether his acts are within such authority. In the early case of *Ex Parte Milligen*, 4 Wall 2, 120, 121, the Supreme Court of the United States said:

> "The Constitution of the United States is a law for rulers of people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be

suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or depotism. But the theory of necessity upon which it is based is false; for the Government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence."

This is not a case in which it is sought to control the discretion of the President or of the Postmaster General. It is not here contended that either of them exercised in an improper manner any authority which he possessed. On the other hand, it is here contended that the telephone companies in their answers purport to rely upon acts of the Postmaster General of the United States performed wholly without any authority. The courts could not in any wise control the discretion of an executive officer acting within his conceded authority, but when an executive officer acts arbitrarily in excess of his authority then it is for the courts, and for the courts alone, to restrain such unauthorized action; and a suit brought for that purpose is not a suit against the United States or the state and is not a suit to control property of the United States or of a state, regardless of the fact that the person assuming to exercise authority which he does not possess may be an officer in the executive department of the United States or a state.

Hopkins v. Clemson College, 221 U. S. 626, 643, 644.

Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620.

The contention of the defendants is that the United States is the real party defendant in interest. That would be true if this suit related to the exercise by the Federal government of any authority which it has a right to exercise. Our contentions in this case rest mainly upon the proposition that the joint resolution of Congress preserved to the state of South Dakota the regulation of intrastate telephone toll rates. If this is true, the government of the United States, the Postmaster General or any agents of the Postmaster General, have no power to prescribe such rates. If under such circumstances the defendant telephone companies attempt to collect unauthorized charges for their intrastate toll messages they may be enjoined in an action which does not name the United States as a party, because the United States can have no interest in a matter wholly

beyond its jurisdiction or control. It is true that courts cannot control the discretion of officers of the United States or of a state. Courts can control the ministerial acts of such officers; but this case rests upon a different proposition. The acts of the telephone companies sought to be enjoined are not acts of the Federal government, because beyond its powers. It is not sought in this case to control the President's discretion, because it relates to a matter wholly beyond his jurisdiction. The defendant telephone companies are threatening to do an act which, if our construction of the law is correct, is unlawful, and they may be restrained from doing so.

Nobel v. *Railroad Company,* 147 U. S. 165, 13 Sup. Ct. Rep. 271.

Caldwell v. *Robinson,* 59 Fed. 653.

American School of M. H. v. *McAnnulty,* 187 U. S. 94.

Louisiana Board of Liquidation v. *McComb,* 92 U. S. 531, 541.

Conclusion

It seems clear that the defense in this case when considered upon any of the grounds that have been urged must fail. We believe that upon its consideration of the case this Court must conclude that the following propositions have been established: (1) That Congress did not intend to confer upon the President the power to make intrastate rates for telephone companies; but that on the other hand, it expressly reserved to the states in the exercise of their lawful police regulations, the right which they had always possessed theretofore to regulate such intrastate rates; (2) That Congress was without power, under the Constitution of the United States, to delegate intrastate rate making power to the President or to the Postmaster General; and that if Congress attempted so to do, pursuant to its war powers, it did not succeed, because the making of intrastate rates for telephone companies is a matter wholly unrelated to war purposes, and is in no sense a war measure; (3) That this is not a suit against the United States or the President, or any other officer of the United States; that its purpose is not to control revenue or property of the United States; that the defendants are wongdoers who cannot defend upon the ground that they have acted under orders

which the President or the Postmaster General made wholly in excess of authority; and that, therefore, the suit is one of which the Supreme Court of South Dakota had original jurisdiction; and (4) that the judicial power of the courts extends to the controversy, because it is not one in which it is sought to control administrative discretion, but to restrain acts in threatened violation of law in excess of legal authority.

The decree of the Supreme Court of South Dakota should accordingly be affirmed.

Respectfully submitted,

BYRON S. PAYNE,
Attorney General,
OLIVER E. SWEET,
Assistant Attorney General,
Solicitors for Defendants in Error.
Pierre, South Dakota.

April 30, 1919.

APPENDIX

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNA.

Sitting in Equity.

Equity Docket No. 631.

Commonwealth Docket, 1919, No. 1.

Commonwealth of Pennsylvania, Ex. Rel., William I. Schaffer, Attorney General, *Plaintiff*,
vs.
The Bell Telephone Company, of Pensylvania, *Defendant*.

Equity-Injunction-Motion to continue same—Rates-Increase of without approval of Commission—Federal control—Police power of State—Constitutional provisions—Jurisdiction of Court.

The joint resolution of Congress authorizing Federal control and operation of telephone and telegraph lines for the duration of the war, provides that nothing in the Act, be construed to impair the police power of the several states. An increase of rates without the approval of the Public Service Commission is an unwarranted interference with the police power of the State in violation of the above named provision.

The President as Commander-in-Chief of the army or navy may seize and control the property of the defendant company for use in prosecution of the war, but the rates and tolls charged others for uses of the lines while under Federal control have no real relation to Federal use for war purposes. Hence, an attempt to increase the rates without the consent of the Commission is not an official act, and the representatives of the President are subject to the control of the court in such matters.

Injunction continued until final hearing.

APPEARANCES:

Bernard J. Myers, Deputy Attorney General, Commonwealth of Pennsylvania,
William I. Schaffer, Attorney General, Commonwealth of Pennsylvania.

Representing the Plaintiff.

J. L. Swayze,
Thomas Patterson,

Representing the Defendant.

Rogers L. Burnett, United States Attorney for the Middle District of Pennsylvania,

Representing the United States of America.

KUNKLE, P. J., April 2, 1919:

The attorney general has filed this bill in behalf of the Commonwealth and seeks thereby to restrain the defendant company from charging rates for the use of its lines within the State different from those approved by the Commonwealth's Public Service Commission. A preliminary injunction was granted and the case is now before us on a motion to continue the same. The defendant has filed its answer in which it denies that it has any control over its lines or is now operating them, except under the direction and orders of the Postmaster General who has taken possession of and is operating them, and that the changed rates and toll charges are being enforced by him. It disclaims any responsibility for the operation of its lines under the new and unapproved rates. The jurisdiction of the Court also is questioned in a plea filed by the United States Attorney.

The Postmaster General in taking and assuming the control of the defendant's lines and in operating its systems, acted under the proclamation of the President of the United States issued July 22, 1918, to the effect directing that the supervision, possession, control and operation of telephone systems shall be exercised by and through the Postmaster General, said "Postmaster General may enforce the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine through the owners, managers, Board of Directors, receivers, officers and employees of said telegraph and telephone systems." Acting under authority thus conferred, the

Postmaster General by an order known as No. 2495 issued December 12, 1918, directed that the rates for toll service over the deefndant's telephone lines should be charged and computed according to a standard schedule set forth in the order, which rates were not approved by the Commonwealth's Public Service Commission as required by the Public Service Company Law (P. L. 1913, p. 1374) and were different from those approved and theretofore in force. The President's proclamation was issued pursuant to a joint resolution of Congress, approved July 16, 1918, which provides that: "the President during the continuance of the present war is authorized and empowered whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine, cable or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the proclamation by the President of the exchange of the ratification of the treaty of peace. Provision is also made in the resolution for the payment of compensation to the persons affected for the use and operation of the systems. The resolution further provides that nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations of the several states, may effect the transmission of Government communication or the issue of stock or bonds by such system or systems." Thus it appears the President is authorized when he shall deem it necessary for the national security or defense, to take under his control and operate in such manner as may be deemed needful or desirable, for the duration of the war, the defendant's telephone system; and the duration of the war is practically defined to extend to the date when the President shall proclaim the exchange of the ratification of the treaty of peace. The time when he shall exercise his authority and the manner of its exercise is committed to his judgment and discretion. However, the period during which he may exercise his authority is limited and he may not in exercising it, impair or affect the lawful police regulations of the States.

The action of the President in taking possession, as-

suming control and supervision of telegraph and telephone systems within the jurisdiction of the United States is stated to be not only under and by virtue of the power vested in him by the Federal resolution but by all other powers thereto him enabling. The Commonwealth contends that the powers thus conferred may not be exercised at the present time because the war during which they were to be exercised is at an end; that the resolution did not contemplate a change of defendant's rates and tolls by the President when authority was granted him to operate its lines; that the resolution of Congress has been misconstrued, as it specifically provides against the impairment or change of existing laws of the States in relation to taxation or the lawful police regulation of the several states, and that the required approval of the defendant company's rates by the Public Service Commission is one of the Commonwealth's police regulations. The defendant takes issue on these propositions and insists that the President's power to do the act complained of arises not only out of the resolution of Congress referred to, but also inheres in his office as Commander-in-Chief of the army and navy, which no Act of Congress can constitutionally limit. It further objects to the proceeding as being one in effect against the United States which has not consented thereto. The controversy is therefore over the power of the President and Postmaster General to change the rates from those approved by the Public Service Commission of the Commonwealth and in force prior to and at the time the defendant company was taken into their control and operated by them; and also over the jurisdiction of the Courts to interfere with them in so doing.

As has been said, it is averred and not denied that the officers of the company are not operating it or attempting to enforce the new rates and tolls, but it is contended on the part of the Commonwealth, that although not acting of their own motion but merely as a means and instrumentality, they are acting at the behest of the Postmaster General representing the President, and are thus assisting and abetting him in enforcing the changed tolls and to that extent they should be enjoined.

We have stated that the defendant company and the United States District Attorney also assert that the Postmaster General's power to change the rates which were

theretofore adopted by the company and approved by the Commonwealth's Public Service Commission as required by law, is found in that provision of the Constitution of the United States, which makes the President thereof the Commander-in-Chief of the army and navy.

Under the provisions of the Constitution there can be no question that the President of the United States is empowered as Commander-in-Chief of the army and navy to direct the movement of troops and to plan the campaign and to do everything necessary for the prosecution of war. It may be conceded for the purposes of this case, that he and the Postmaster General acting for him, have the power to take over and use the property and lines of the defendant company in the proper conduct of the war; to use them for governmental communications in connection with the prosecution of the war and to prevent or allow their use by others. The question, however, remains whether they are empowered to use and operate the defendant's telephone system for any other purpose than such as the necessity of the occasion actually demands. It is self-evident that he may use it for all war purposes without changing the rates which the Commonwealth's Public Service Commission approved, because in the conduct of the war and in the exercise of his power as Commander-in-Chief of the army and navy, the rates and tolls chargeable to the public would be of no moment to him, inasmuch as he may use the defendant's lines and property by virtue of such power and under the necessity of the circumstances to the exclusion of the public. The rates and tolls charged others whom he may permit to use the lines while under his control would seem to have no real relation whatsoever, to his use of the system for all proper war purposes. Hence it would appear that his attempt to change the rates and enforce rates which were not approved by the state authorities is wholly outside of his power. If this be true, in so doing he is not engaged in an official act but in acting beyond his power. In this view of the case an injunction interfering with him from so acting would not amount to an interefernece with him as an official or with his official action and therefore would not be against the Federal Government. Where the authority to do the act complained of is challenged the suit is not against the United States. *Phil. Company* v. *Stimson*, 223 U. S. 605, *United States* v. *Lee*, 106 U. S. 196. If he be

acting outside of his power he ought not to be permitted to seek refuge behind the office which he occupies and is administering.

But it is urged that the President is the sole judge of the necessity calling for the exercise of his war power and that his discretion is not reviewable by the courts. This proposition seems to be settled to the contrary in *Mitchell* v. *Harmony*, 13 Howard, 115; *Little* v. *Barreme*, 2 Cranch, 170. In the former case it was said: "our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it." If this be so as to the taking of property, it must be equally so as to its use thereafter. However, be that as it may, we do not understand the law to be when the President has taken property under imperative and imminent necessity that he is the sole judge of the purposes for which he may use it. Whether he is using it for war purposes is a judicial question and depends upon the facts and circumstances of the particular case. When he attempts to use the defendant's lines and it does not appear that it is for a war purpose, but on the contrary appears to be for a purporse having no apparent or direct relation to the prosecution of the war, it must be shown we take it, that he is using it for a lawful and constitutional end. The necessity out of which his power arises does not appear in the present case. The fact that the necessity actually existed for changing the rates and charges and arose out of war conditions and that the change was in the interests of the national security and defense, does not appear. On the contrary, no necessity appears unless it be that of raising revenue to help the Federal Government compensate the defendant company for the use of its property. That is not a war purpose. The proviso to the Congressional resolution shows that in the opinion of Congress there existed no military necessity for changing the rates.

It may be conceded that the courts have no power to review the President's official discretion in operating the company for war purposes, but a different question is presented when it is claimed that in changing the rates and

attempting to enforce the unapproved rates, he is acting beyond his powers. The question whether the power which he is exercising belongs to him is a question of fact determinable from the admitted purposes for which he is exercising it. It would hardly be contended that if he took possession of private property under what is called his war powers and used it for other than war purposes he was acting within his constitutional powers. To illustrate, if he took possession, under his war powers, of a citizen's residence and used it by renting it to another for the purpose of revenue, could he justify the act under his war power? Surely he could not divert the property taken, from a war use to some other use. It would seem therefore that if he attempts to use the defendant's telephone system for a purpose which has no relation to the national defense or security and if he may not, as President, because of his office, be subjected to injunction or to the process of the courts for so doing, still there is no reason why those who assist him and are within the jurisdiction of the courts, should not be prevented so far as they are amendable to judicial process.

We recognize the fact that there may be many cases involving the exercise of the President's war power where a Court of Equity would refuse to interfere because more harm than good might be done by interference, but we do not think that the present case is one of them. As we have already observed, the use by the public of the defendant's system and lines does not appear to have anything to do with the war or the national secuirty or defense, and this is true, consequently, with respect to the rates chargeable for such use. They are wholly aside from the purpose for which the system was subject to be taken under government control and operation; and the system may be operated for such purpose independently of the rates chargeable to the public.

It may be suggested that it is the duty of the President while in control of the defendant's lines to so operate them as to result in the least loss to its business. This may be true, but would hardly justify the change of the rates chargeable to others for the use of the lines when, in the absence of any proof on the subject, the rates fixed by the Public Service Commission, whose duty it is to pass on the question, must be presumed to be fair, reasonable and adequate between the company and its patrons. If they

were not, there is no doubt on applying to it the Commission would have afforded ample relief.

It is also asserted that the President of the United States and his Postmaster General were warranted in changing the rates approved by the State authorities by the Federal Resolution which authorized the taking over, possession, control and operation of the defendant company's system of lines. It is important, therefore, to examine into the Federal resolution and to ascertain whether it will bear the construction which they have put upon it. The very resolution to which they appeal for justification of their act expressly provides that in acting under it, the State's police regulations shall not be impaired. Here is an express prohibition against interference with the rates of the defendant company; for it cannot be successfully disputed that the regulation of rates by State law is a police regulation. The suggestion that the police regulation referred to in the proviso mean police regulations other than those relating to rates and tolls is not tenable. To so hold would be practically to nullify the proviso. We cannot understand a construction which would hold the reference to be to that which is remotely rather than to that which is closely allied to the subject of the legislation. What we have said with respect to the relation of the rates and tolls chargeable by the company to the use of the lines for war purposes and for the national security and defense, under the Presidential power is applicable also to the use of the lines under the Federal resolution, even if no effect be given to the proviso. It is quite clear that the resolution did not contemplate an interference with the rates and tolls in force at the time it was passed. If it had made no declaration on the subject we would not assume that it intended to authorize the operation of the lines for purposes other than war purposes or contrary to the laws of the state. Here too then it is evident that the President and his Postmaster General are acting beyond any power conferred upon them by the Federal resolution. It is no answer then to say that they were engaged in an official act, representing the government of the United States when they changed the rates and tolls chargeable for the use of the lines within the State by others, and may not therefore be interfered with or obstructed without the Government's consent.

It appears therefore that the change of the rates chargeable to the public has no effective relation to the use of the defendant's system for war purposes or the purposes for which it was authorized to be taken over by the Federal authorities, either under the power of the President, as Commander-in-Chief, or under the Federal resolution.

The conclusion follows that neither the President nor the Postmaster General was acting officially in changing the rates and tolls, but they acted beyond the scope of their powers. In such case they are open to interference and prevention so far as lies in the power of the State Courts, especially in the present case where their act amounts to a disregard of the Commonwealth's laws and is an attempt to do that which the defendant company itself could not lawfully do.

It will hardly be questioned that the Commonwealth of Pennsylvania has the power to enforce its own statutes, and to prevent their violation; or that this Court has local jurisdiction to entertain the present bill for the purpose of preventing the violation of the order of the Public Service Commission. This right seems to be clear, Sect. 34, Act of July 26, 1913, P. L. 1429, *Com.* vs. *Order of Solon*, 166 Pa. 38; and we think anyone who undertakes to disobey the order should show such a state of facts as plainly justifies his action.

For the considerations stated which we feel are developed only in part, we are induced to continue this injunction until final hearing, when the facts of the case may be fully shown and the questions which have been raised may be more thoroughly discussed and considered.

Accordingly the motion to continue is sustained.

I fully concur in the foregoing opinion and conclusion. Sam'l J. M. McCarrell, J.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Ex rel Ross A. Collins, Attorney General,
vs.
Cumberland Telephone and Telegraph Company,

In Banc.—SMITH, C. J.

The contentions of the appellees are, first, that the court below without jurisdiction for the reason that this is in effect either a suit against the United States, or an attempt to control the discretion of the President in the exercise by him of an executive function;

2nd, that the United States is not within the statutes of this state providing for the supervision of telegraph and telephone systems for two reasons, (a), it was not engaged in operating such systems when these statutes were enacted, and (b) is not specifically referred to therein;

3rd, that the right of the several states to regulate intrastate telegraph and telephone rates is not preserved by the provision of the resolution of the Congress adopted on July 16, 1918, authorizing the President to take possession of and operate the telegraph and telephone systems of the country, "That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the state in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of Government communications or the issue of stock and bonds by such system or systems";

4th, that the President is vested by the Constitution, because of his designation therein as commander in chief of the army with the power to take possession of and operate the telegraph and telephone systems of the country for military purposes, and as an incident thereto to permit their use for private purposes on such terms as he may prescribe, which power the resolution adopted by the Congress on July 16, 1918, did not add to and cannot be held to.

Taking these contentions up in their reverse order, we are of the opinion that:

1st. The Congress has the power to define the powers to be exercised by the President as Commander-in-Chief of the army, and to prescribe the mode in which they should

be exercised; but if mistaken in this, that the power to operate a telegraph or telephone system as a public utility without the zone of military exportations is not one of the powers which can be said to be necessarily appurtenant to the office of the Commander-in-Chief of the army, and can be rightfully exercised by him only when he has been authorized so to do by the Congress. *McLaughlin* v. *Green*, 50 Miss. 453; *ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281.

2nd. By adopting the proviso to the resolution here in question, and under which the President must operate, if at all, the telegraph and telephone systems of the country as public utilities, it was the intention of the Congress to cause the control of the several states over the operation of the telegraph and telephone systems within their borders, to be interferred with only to the extent necessary to safeguard the transmission by the Government of its own messages, and the issuance of the stock and bond of such telegraph and telephone systems as might be taken charge of by the President, and "the lawful police regulation" therein referred to, are not limited to such only as promote the public health, morals, or safety, but extend also to such as promote the public convenience, or the general welfare within which is embraced a regulation fixing the tolls to be charged for intrastate messages. *License Cases*, 5 How. 504, 12 L.Ed. 255; *Stone* v. *Y. & M. V. R. R.*, 62 Miss. 607; *Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307, 29 L. Ed. 636; *Lake Shore, etc., R. R.* v. *State of Ohio*, 173 U. S. 285, 43 L. Ed. 702; *Chicago, etc., R. R.* v. *State of Illinois*, 200 U. S. 561, 50 L. Ed. 596; *Mutual Loan Co.* v. *Martell*, 222 U. S. 56 L. Ed. 175; *C. & A. Railroad* v. *Tranbarger*, 236 U. S. 65, 59 L. Ed. 1204.

3rd. That the United States was not engaged in operating telegraph and telephone systems when the statutes of this state providing for the supervision of such systems were enacted, and is not specifically referred to therein, does not relieve such systems from the effect of these statutes because they have been taken over by the President for the rason that the resolution adopted by the Congress here in question provides that they shall remain subject to the existing police regulations of the several states.

4th. The injunction here is not against the President in person but against a subordinate officer who seeks to justify his contemplated action by the claim of power dele-

gated to him by the President. This claim does not of itself oust the Court of jurisdiction, but must be established by the apellees, and this they cannot do for the reason that the President has not been vested by the resolution of the Congress here in question with any power to disregard the police regulations of the several states, nor to authorize any subordinate so to do, but on the contrary the resolution expressly enjoins them to observe them, from which it necessarily follows to a subordinate.

5th. The object sought to be accomplished by means of the injunction here in question is neither the destruction of property rightfully in the possession of the United States, nor to forbid the use or disposition thereof by its agent nor to compel its agent to do or refrain from doing something which it has contracted to do, and thereby, in effect, compel the Government in the one case to perform, and in the other to break its contract, but is simply to restrain a public officer from acting in excess of his authority, so that the case is not ruled by that line of cases exemplified by *Hageed* v. *Southern*, 117 U. S. 52, 29 L. Ed. 805; *Belknap* v. *Schild*, 161 U. S., 40 L. Ed. 599; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. Ed. 954; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 48 L. Ed. 1134; *Oregon* v. *Hitchcock*, 202 U. S., 60 L. Ed. 935; *Naganab* v. *Hitchcock*, 202 U. S. 473, 50 L. Ed. 1113; *Louisiana* v. *McAdoo*, 234 U. S. 627, 58 L. Ed. 1506, and *Wells* v. *Roper*, 246 U. S. 335, 62 L. Ed. 755; but is ruled by that line of cases exemplified by *Osborn* v. *Bank of United States*, Wheat 9, 738, 6 L. Ed. 204; *Board of Liquidation, etc.*, v. *McComb*, 92 U. S. 531, 23 L. Ed. 623; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363; *Nobles* v. *Union River Logging Railroad*, 147 U. S. 165, 37 L. Ed. 123; *Scott* v. *Donald*, 165 U. S. 107, 41 L. Ed. 468; *Smyth* v. *Ames*, U. S. 466, 42 L Ed. 819; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 47 L. Ed. 90; *ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714; *Ludwig* v. *W. U. Tel. Co.*, 216 U. S. 146, 54 L Ed. 423, and *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 56 L. Ed. 570, and the fact that the money which the appellees are sought to be enjoined from collecting will be turned over by them, if collected, to the United States, or will be expended by them for its benefit does not make it a necessary party to the suit. *U. S.* v. *Peters*, 5 Cranch. 115, 3 L. Ed. 53; *Osborn* v. *Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Poindexter* v. *Greenhow*,

114 U. S. 270, 29 L. Ed. 187; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363; *ex parte Tyler*, 49 U. S. 164, 37 L. Ed. 689; *Scott* v. *Donald*, 165 U. S. 58 41 L. Ed. 632.

The appellants did not ask the court below to interfere with the official discretion of the Postmaster General but in the language of Judge Hughes in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 56 L. Ed. 570, "challenged his authority to do the thing of which complaint is made. The suit rests upon the abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

The decree of the court below will be reversed and a decree will be rendered here reinstating the injunction prayed for and making it perpetual.

Reversed and decreed here.

Stevens, J., dissents.

State of Illinois, }
County of Cook, } ss.

In The

SUPERIOR COURT OF COOK COUNTY.

People of the State of Illinois, *Complainants,*

vs.

Chicago Telephone Company, Bernard E. Sunny, W. R. Abbott, American Telephone & Telegraph Company, Theodore N. Vail and David F. Hall, *Defendants,* } In Chancery. No. 341126.

Hon. CHARLES M. FOELL, Chancellor.

This is an action by the People of the State of Illinois instituted by the Attorney General by direction of the Public Utilities Commission, under section 75 of the Act of the General Assembly of the State of Illinois entitled "An Act to Provide for the Regulation of Public Utilities," in force

July 1, 1914, to enjoin The Chicago Telephone Company, Bernard E. Sunny, its president, and W. R. Abbott, its general manager; American Telephone and Telegraph Company, Theodore N. Vail and David F. Hall, its president and Chicago agent, respectively, who are made defendants, from putting into effect a certain schedule of long distance *intrastate* telephone rates. A temporary injunction was granted on motion based on the verified bill of complaint. The cause now comes on for final hearing on bill, answers and replication and the stipulation of counsel in open court that the affirmative facts, well pleaded in the answers, are true.

The answers, in the nature of pleas to the jurisdiction of the court, admit that the schedule of telephone rates which the defendants propose to put into effect, have been filed with, but suspended by the Public Utilities Commission and are in some instances materially higher than the rates now in force.

The substance of the defendants' defense is, as set up in their answers, that the telephone systems involved in this action are in the possession of, and being operated by, the Federal Government, through the agency of these defendants; that the defendants have no personal interest in the subject matter; that the action seeks to interfere with the property of the United States and is therefore in effect a suit against the Government, and as such can not be sustained; that there is no provision in either the joint resolution of Congress, the proclamation of the President or order of the Postmaster General, under authority of which the Government has taken possession of and is operating said lines, which reverses to the States any control over *intrastate* rates.

The complainants, on the other hand, contend that the Government's possession and operation of the lines are subject to the "lawful police regulations" of the state, insofar as the fixing of *intrast*ate rates is concerned, and that the power vested in The Public Utilities Commission by the Act creating it, to regulate telephone rates is the exercise of such police power as is reserved to the state by the *proviso* in the resolution of Congress, and that therefore the attempt of the defendants to fix *intrastate* rates is without warrant of law.

A full understanding of these general contentions in all

their details requires a consideration of the joint resolution of Congress, passed on July 16, 1918, the proclamation of the President issued July 22, 1918, and the order of the Postmaster General of August 1, 1918, which are the bases of the defendants' defenses.

The resolution of Congress is as follows:

Joint resolution to authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the some in such manner as may be needful or desirable for the duration of the war, and to provide compensation therefor.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President during the continuance of the present war is authorized and empowered, *whenever he shall deem it necessary* for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable or radio system or systems, or any part thereof, and to operate the same in *such manner* as may be *needful* or *desirable*, for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace; *provided*, that just compensation shall be made for such supervision, possession, control or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, Paragraph 20, and Section 145 of the Judicial Code; *provided*, further, that nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communica-

tions, or the issue of stocks and bonds by such system or systems."

The proclamation of the President, after reciting, by way of preamble, the foregoing resolution, provides, *inter alia*, as follows:

"And whereas it is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and *every telegraph* and *telephone system*, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all material and supplies.

It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson."

On August 1, 1918, the Postmaster General issued an order containing the following provisions:

"Pursuant to the proclamation of the President of the United States, I have assumed possession, control and supervision of the telegraph and telephone systems of the United States. This proclamation has already been published, and the officers, operators and employes of the various telegraph and telephone companies are acquainted with its terms.

Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared, and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligation, unless otherwise ordered by the Postmaster General. All officers, operators and employes of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same

officers as heretofore, and on the same terms of employment."

Pursuant to the foregoing resolutions and proclamations, the President, through the Postmaster General, did take possession of and commenced to operate the telephone systems of the defendant companies on July 31, 1918. It is under the authority of such possession and operation and pursuant to instructions from the Postmater General, under date of January 7, 1919, to install the rates herein sought to be restrained, that the defendants, as agents of the Postmaster-General (as they claim) contend not only that it is their right, but their duty, in obedience to the said instructions, to put into effect the new schedule of rates, regardless of the disapproval by the Public Utilities Commission.

The right of the Government to take possession of and operate the telephone lines in question, under the authority conferred by the above quoted resolution, passed as a war measure under the powers contained in the Constitution, is not questioned by the complainants. The proceeds from such operation, it is admitted, goes to the Government and becomes the property of the Government absolutely, the compensation to the defendant companies being paid by the Postmaster General in accordance with the terms of a contract entered into between the Government and said companies. There is no express provision in said contract that the compensation to be paid to the defendant companies is to be paid out of the proceeds of the operation of said lines by the Government, or that it is limited in amount by said proceeds.

It is conceded by the defendants, "that if there is jurisdiction in any court to entertain this proceeding, it properly originates in this court rather than in a Federal court; and if there is such jurisdiction, the defendants are subject to be enjoined as prayed, *if* it be further held that the aforesaid *proviso* precludes the defendants from collecting such *intra* state rates as the proper Federal executive officers or agents may deem desirable." The proviso referred to in this concession is that contained in the resolution of Congress of July 16, 1918, *supra*, and is as follows:

"Provided, further, that nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the *law-*

ful police regulations of the several states, except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

The decision of this case, in our judgment, is dependent on the correct answer to two main questions:

FIRST. Does the above quoted *proviso* reserve to the state the exclusive right, as against the Federal government, through its Public Utilities Commission, to control *intrastate* telephone rates, subject only to the limitation that such control may not interfere with the transmission of Government communications, or the issue of stocks and bonds by the defendant companies; *i. e.*, the right to exercise the police power in its broad sense; or did Congress use the expression "Lawful police regulation" in a more restricted sense as applicable only to measures dealing with the public health, morals and safety?

Second. If it should be concluded that the proviso reserves to the State not only the right to deal with the health, public morals and safety, but with all measures concerning the *public welfare* as well—including the powers to regulate telephone rates—has *any* court jurisdiction to enjoin the defendants, or does the case present a question not justifiable in the courts, without the consent of the Government to be sued?

In this connection it is not claimed by complainants that there is any special provision in the resolution or proclamations under consideration, or any provision of law, permitting the Government to be sued in relation to the subject matter of this action.

As to the First Question.

The regulation of public utilities by the Public Utilities Commission of Illinois is a valid exercise of the *police power* of the State. (*City of Chicago* v. *O'Connell*, 278 Ill. 591.) The fixing of reasonable rates to be charged by public utilities is an exercise of the police power. (*Munn* v. *Illinois*, 94 U. S. 125; *Woodburn* v. *Public Service Cor.*, 82 Oregon 114; *Home Telephone Co.* v. *Los Angeles*, 125 Fed. 554; *Arkansas Rate Cases*, 187 Fed. 297.)

It is said, however, by the defendants, that the phrase "police power" has a primary or restricted significance, as well as a mere comprehensive meaning. That in its primary sense it defines the power of the state which may be exer-

cised for the protection of the public health, safety or morals; while in its broader sense it means the right to enact any and all measures for the protection of life, liberty, property and for the general welfare, the only limitations being found in the Constitution itself. The defendants contend that Congress intended to reserve to the State only the right to exercise the police power in this restricted or primary form—"The right of regulating the position of poles in the streets, the position of wires and their insulation, the rate of speed at which the vehicles of the telephone company might travel, and the sanitary conditions under which the employes might labor, and endless matters of like nature."

The courts have not all adopted a uniform definition of the police power. It has even been referred to by the Supreme Court of the United States as "that somewhat ambiguous term." (*Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347.) That this dual aspect of the terms has been judicially recognized must be conceded. *Freund on Police Power*, Sec. 10, refers to "Police regulations in the strict sense of those terms." Our own Supreme Court in *Hawthorne* v. *People*, 109 Ill., at page 311, says:

> "It is said that this is not a police regulation. That may be true if the term were confined merely to the protection of the health and morals of the people. * * * when exercised by the Legislature, in its more *comprehensive sense*, in the passage of laws for the protection of life, liberty, and property, or laws for the general welfare, the only limitations to restrain its action must be found in the Constitution."

In Manigault v. *Springs*, 199 U. S., p. 48, the court, speaking of the police power in connection with an act of the General Assembly, says:

> "Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people." * * *

There is no Federal Police Power; therefore, when Congress used the expression "police regulations," it must have done so in the sense in which that term has been defined in the several states. (36 Cyc. 1118 (f).)

The sense in which Congress used the term "police regu-

lations" in the *proviso* must be determined from an examination of the entire resolution, and from that only. By the enacting clause thereof the President is given practically unlimited power, "whenever he shall deem it necessary for the national security or defense to take and operate the telephone systems of the country in any manner he may deem needful or desirable for the duration of the war." This broad grant, however, is limited by the *proviso* that such possession and operation shall not be construed as affecting the rights, under existing laws or powers, of the several states in relation to taxation or lawful police regulations. If the resolution went no farther, and the proviso were given the effect which would flow from the reservation to the State of Illinois of all rights under *police regulations*, as this term is defined by the courts in its comprehensive sense, it would clearly confer no power on the Federal Government or its agents to fix *intrastate* rates, and undoubtedly would have reserved to the State powers which might be exercised in such a manner as to interfere with the transmission of Government communications, and possibly give it the right to control the issue of stocks and bonds of the telephone systems. It is manifest that the primary purpose which the Government sought to accomplish in taking over the telephone systems was to be in control of the facilities of communication in time of war.

The resolution provided that "just compensation shall be made for such supervision, possession, control or operation, to be determined by the President." The amount of just compensation allowed by the Government, of course, is vitally affected by the amount of outstanding stocks and bonds of the telephone companies; therefore it was quite proper that the Government should be in a position to supervise all stock and bond issues of such companies.

By article *III* of the said act creating the Public Utilities Commission of this state, authority is conferred on said commission to supervise and control the issue of stocks and bonds of public utilities. If this be a valid provision, such supervision and control would undoubtedly be an exercise of the police power in its comprehensive, rather than its restricted, sense. To guard against the possible attempt by the states to exercise the police power in such a manner as might interfere with the transmission of Government communications or the issue of stocks and bonds by the tele-

phone companies, Congress apparently took the precaution to limit the scope of said proviso by adding an exception as follows: "Except wherein such laws, powers or regulations may affect the transmission of Government communications or the issue of stocks and bonds by such system or systems." Grammatically, we think the words "issue of stocks and bonds," as used in the said exception, are quite as referable to the word "regulations" as to the words "laws" and "powers."

The duty of the court when called on to construe a legislative enactment is to ascertain the legislative intent as therein expressed. Considering the resolution in its entirety, we can not escape the conclusion that Congress, by the *proviso*, reserved to the several states the right to exercise the police power in its comprehensive, rather than in its restricted sense, and by said resolution did not confer upon the President or the defendants, if they be regarded as the agents of the Postmaster General, the right to regulate *intrastate* telephone rates. If this conclusion be correct, then the attempt by the defendants to install a schedule of rates higher than those now in existence, and in violation of the ruling of the Public Utilities Commission, is without warrant of law.

As to the Second Question.

Assuming the correctness of the foregoing conclusion, is the objection that this action is in effect against the Government, althought only the corporations and their resident officers and agents are named as defendants, valid, so as to bring the action within the purview of the rule of law which provides that the Government may not be sued without its consent? We think not.

The opinions of *nisi prius* courts in Ohio, Indiana and Michigan have cited sustaining our view. The recent decided cases (not yet reported) of *Public Service Commission* v. *New England Tel. & Tel. Co.* (Supreme Court of Mass.); *Railroad Commission of Louisiana et al.* v. *Cumberland Telephone & Telegraph Co. and Albert S. Burleson, Postmaster General* (Supreme Court of Indiana); *State of North Dakota* v. *Northwestern Telephone Co. and Burleson, Postmaster General* (U.S. Dist. Court, No. Dakota); and a *nisi prius* decision of Mississippi in the case of *State of Mississippi* v. *Cumberland Telephone & Telegraph Co. et al* hold to the contrary.

The question is by no means free from doubt, and it is with much diffidence and hesitation that this court finds itself unable to reconcile its views to decisions reached by courts of such distinguished ability. These courts, however, with one exeception (The U. S. Dist. Court, No. Dak.) seem to assume that the agents of the Government in attempting to fix *intrastate* rates were acting *within* the scope of the authority conferred by the resolution of Congress; although having the same resolution involved here under consider tion, the Massachusetts Court says at one point: "There is nothing on this record to indicate that the defendant, if and so far as it is an agency of the Federal Government, upon which we express no opinion, is exceeding the limits of power conferred by the resolution, proclamation and bulletin," and from this premise reaches the conclusion that the suit is in effect against the Government; yet, at another point in its opinion, it says: "Therefore it appears to us unnecessary to consider or discuss the merits of the question whether the proviso of the resolution of July 16, 1918, under its reservation of 'lawful police regulations of the several States' justifies rate regulation by a state in the exercise of its police power." Of course if it be assumed that the right to regulate *intrastate* rates is, by the resolution of Congress, vested in the Federal Government and that the defendants here are acting within the scope of their authority, then we should be inclined to the view that the suit is in effect against the Government and should abate, and the fact that the Government as such or its Postmaster General, are not parties defendant would be immaterial. (*Wells* v. *Roper*, 246 U. S., p. 337.) This view grows out of the theory that in such cases the property of the United States, being in the lawful possession or control of its agent, the suit against such agent is an interference with the property of the Government. But where possession of property is south to be acquired by the agent of the United States, without warrant of law, or by an attempted exercise of a right in excess of his authority, quite another question is presented.

If the United States has not the right to fix *intrastate* rates, then it would seem that the attempt of the defendants (even though acting wholly under the order of the Postmaster General) to increase telephone rates within the state, is an unlawful attempt to take from the telephone users

their property without due process of law, to the extent that the proposed new rates exceed those now in existence and which have been approved by the Public Utilities Commission; and a suit against the corporations and individuals committing such unwarrantable acts, even though it be conceded they are acting purely as agents of the Government, without any personal interest in the subject matter, we think, is not an interference with the Government's revenue. The Government does not have possession of, nor the right to obtain possession of such revenue; *i. e.*, the proceeds from the excess rates. The suit merely seeks to restrain them from obtaining possession thereof without any lawful right to do so. Were the suit an attempt to interfere with the defendants collection of intrastate rates, lawfully fixed under the jurisdiction of the Public Utilities Act, manifestly it could not be sustained because such action would be an attempted interference with the defendants acting within the lawful scope of their authority, relative to revenues which they have the undoubted right to collect for the Government.

The cases mainly relied on by defendants, and cited by the courts which have sustained the contention that an action such as this is in effect against the Government and therefore can not be sustained without the Government's consent, are: *Louisiana* v. *McAdoo*, 234 U. S. 627; *Oregon* v. *Hitchcock*, 202 U. S. 60, and *Wells* v. *Roper*, 246 U. S. 335.

In *Louisiana* v. *McAdoo*, *supra*, the State of Louisiana, a producer of sugar operating plantations by convict labor, petitioned the Supreme Court of the United States for leave to bring suit against McAdoo, the then Secretary of the Treasury, to compel him to collect a duty on sugar imported from Cuba, higher than he was at the time collecting under his construction of the provisions of the Tariff Act. The petition was denied. His authority in the matter of the supervision and collection of import duties was not questioned. The proposed action was an attempt to review his judgment in respect to a matter concerning which his authority to act and to exercise a discretion was not questioned. The court on page 633 says:

> "* * * if the matter in respect to which the action of the official is sought is one in which the exercise of either

judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official *entrusted by law with its execution.* Interference in such a case would be interference with the ordinary functions of government."

In *Oregon* v. *Hitchcock*, supra, by leave of court the State of Oregon filed an original bill to restrain Hitchcock, the Secretary of the Interior, and Richards, Commissioner of the General Land Office, from allotting or patenting to Indians or other persons certain lands within the limits of Klamath Reservation. A demurrer was sustained and the bill dismissed. On page 70 the court says:

"Again it must be noticed that the legal title to all these tracts is still in the Government. No patents or conveyances of any kind have been issued * * * under these circumstances, it is not the province of the courts to interfere with the Land Department in its administration."

In *Wells* v. *Roper*, *supra*. Wells filed a bill for injunction to restrain Roper, First Assistant Postmaster General, from annulling a contract theretofore made between Wells and the Postmaster General on behalf of the United States, and from interferring with the carrying out of said contract. The bill was dismissed. On page 337, Mr. Justice Pitney, delivering the opinion of the court, says:

"* * * The averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity *and within the scope of his duties.*"

These cases, it seems to this court, are distinguishable from the one at bar, in this, that the *Louisiana* and *Wells* cases, the Secretary of the Treasury and the Assistant Postmaster General, respectively, were clearly acting within the scope of the power with which they were unquestionably invested, and in reference to subject matter over which they exercised discretionary and not merely ministerial authority. In the *Hitchcock case the* subject matter of the suit was land, the *legal title* to which was in the United States, and the suit was in effect an attempt to take from the Government its property.

In the suit at bar, if our view of the meaning of the

proviso contained in the resolution of July 16, 1918, is correct, the defendants' attempt to fix *intrastate rates* was an act unwarranted in law, as would have been the act of the Postmaster General in taking possession of the telephone systems involved, had said resolution never been passed. This bill prays for no intereference by the court with any revenue to which the United States is entitled by reason of its possession of the telephone systems in question, viz., the revenue accruing from rates approved by the Public Utilities Commission.

Courts are not precluded from enjoining threatened acts of agents or officers of the United States even though they have no personal interest in the subject matter of the litigation, if such threatend acts are wholly unauthorized by law, or are in excess of some authority conferred; neither are they necessarily ousted of jurisdiction to determine whether the threatened acts are wholly unauthorized by law or are ultra vires authority conferred merely because a defendant interposes the defense that he acts as a representative of the Government in relation to matters in which the Government only is concerned.

An early and leading case which discusses the origin, reason and history in this country of the rule that the sovereign Government may not be sued without its consent, is that of *United States* v. *Lee*, 106 U. S. 196, in which Lee filed a suit in the Virginia courts to obtain possession of a portion of the Arlington estate, which at the time was occupied, and for more than ten years had been in the possession of certain officers of the United States army, claiming to hold it as agents of the Federal Government as a national cemetery for the burial of soldiers and sailors. The court says on pp. 215, 216:

> "This examination of the cases in this court establishes clearly this result: That the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession can not be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, * * *"

And on pages 220 and 221:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government.

* * * Not only such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any man of life, liberty, or property, without due process of law, or to take private property without just compensation." * * *

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon the rights in controversy between them and the Government."

In *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, the bill charged that the defendant who was the postmaster at Nevada, Missouri, by order of Postmaster General, who assumed to act under the authority of Acts of Congress, was withholding many letters addressed to the complainant containing money orders; that the business of the complainant was not of a character which subjected it to the application of the law under which the postal authorities were assuming to act; in other words that the Government was exceeding its authority. The bill asked for an injunction restraining the defendant from carrying out the order of the Postmaster General. On page 110, the court says:

"Although the Postmaster General had jurisdiction over the subject matter (assuming the validity of the Acts) and therefore it was his duty upon complaint being made, to decide the question of law which the case stated was within the statute, *yet such decision being a legal error does not bind the courts.*"

An injunction as prayed for was ordered.

To the same effect in principle see:

Philadelphia Co. v. *Stimson*, 223 U. S. 619 and 620.
Noble v. *Union River Logging R. R.* 147 U. S. 171 and 172.
Garfield v. *Goldsy*, 211 U. S. 249.
Davis v. *Gray*, 83 U. S. 203.

In conclusion then, being of the opinion that the *proviso* in the resolution of Congress of July 16, 1918, reserved to the State the exclusive right to determine *intrastate* telephone rates, and that the attempt of the defendants to install a new schedule of increased rates over the objection of the Public Utilities Commission is *ultra vires* their power and without warrant of law, the order of the court is that the injunction heretofore issued in the cause be made permanent.

DAKOTA CENTRAL TELEPHONE COMPANY ET AL. *v.* STATE OF SOUTH DAKOTA EX REL. PAYNE, ATTORNEY GENERAL, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 967. Argued May 5, 6, 1919.—Decided June 2, 1919.

The Joint Resolution of July 16, 1918, c. 154, 40 Stat. 904, authorizing the President during the continuance of the present war, whenever he shall deem it necessary for the national security or defense, to take possession and assume control, *inter alia*, of any telephone line or any part thereof, and operate it as may be needful or desirable for the duration of the war, is within the war power of Congress. P. 183. *Northern Pacific Ry. Co.* v. *North Dakota*, *ante*, 135.

Whether the exercise of the power so conferred was justified by the conditions at the time, or was actuated by proper motives, are questions of executive discretion not within the cognizance of the judiciary, under the Constitution. Pp. 184, 187.

The Joint Resolution, *supra*, authorized the complete possession, control and operation of telephone lines by the United States, including the fixing of rates for local service, as brought about through the President's Proclamation of July 22, 1918, and the action of the Postmaster General thereunder, whereby the United States, under

contracts with the owning companies, took over their entire business and became entitled to the revenues therefrom, and fixed the rates; and this was subsequently recognized by the Act of October 30, 1918, c. 197, 40 Stat. 1017. P. 184.

The Joint Resolution, *supra*, provides that nothing therein "shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation" or their "lawful police regulations . . . , except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems." *Held*, that police power here reserved does not include the authority to make local rates, which the resolution as a whole by clear implication transfers to the United States; and that the provision as to stocks and bonds does not justify a contrary construction. P. 185.

There can be no presumption that the state rate-making power was to continue after the telephone lines and business, including the revenues, were completely taken over by the United States and were being operated as federal instrumentalities, under the war power. P. 187. *Northern Pacific Ry. Co.* v. *North Dakota*, *ante*, 135.

An erroneous judgment directly affecting the United States, reversed on the merits, see *Northern Pacific Ry. Co.* v. *North Dakota*, *ante*, 135.

171 N. W. Rep. 277, reversed.

THE case is stated in the opinion.

The Solicitor General for plaintiffs in error (and for respondent in *Macleod* v. *New England Telephone & Telegraph Co.*, *post*, 195.)

These suits are in effect against the United States and therefore not within the jurisdiction of the courts. They seek an injunction which, if granted, will restrain the United States in the use of property, its right to possession and operation of which is not attacked, and would compel the United States to furnish service, at risk of loss, on rates it has superseded. The defendants are operating as appointees and agents of the Government. They have no personal interest in the result. Their compensation as owners of the property is fixed. If the granting of the injunction sought should require the Government to operate these properties at a loss, the loss must be borne by

the Government. *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Goldberg* v. *Daniels*, 231 U. S. 218, 221, 222; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642, 648; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 456; *Wells* v. *Roper*, 246 U. S. 335; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 16, 17.

These cases are unlike those where an officer in excess of authority is invading the property of another or is withholding property from another to which the other person has a right, and are therefore different from such cases as *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *United States* v. *Lee*, 106 U. S. 196.

The purpose and effect of the joint resolution and proclamation was completely and exclusively to vest the possession and control of defendants' telephone systems in the President through the Postmaster General as his appointee on behalf of the United States.

The taking possession and assuming control and operation by the President under the joint resolution, constituted said systems public utilities operated by the Government, and made it the right and duty of the President and his representative to fix the charge to be paid for service.

The operation of the lines thus became a part of the war activities of the Government,—the utilization of the public utilities in its prosecution. *Ex parte Milligan*, 4 Wall. 2; *Legal Tender Cases*, 12 Wall. 457; *Stewart* v. *Kahn*, 11 Wall. 493.

Where the works of a common carrier are used by the Government to carry on a service which is used by the community, such as cars for carrying the mail, and the carrier is utilized to conduct such business, the carrier is as to it a servant of the Government and not a common carrier conducting the business as part of its business, and the rules of law prevailing between private parties

do not fix the relations of the parties. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 649; *State of Alabama* v. *Burleson*, 82 So. Rep. 458; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 10; *Attorney General* v. *Edison Telephone Co. of London*, L. R. 6 Q. B. 244; *Railroad Commission of Louisiana* v. *Cumberland Telephone & Telegraph Co.* (Supreme Court of Louisiana.)

No police power of the State is impaired or affected by not submitting the rates fixed by the officers of the United States to state control, because not only the police regulations of the State do not affect rates made by the Government itself, but the police power does not extend to such a subject. The public has acted and fixed the rate when the public officer of the United States fixed it. The interest of the United States in this property is not private but public, and its protection would be the rule of law that the powers of a State do not extend to interference with the United States in the use of its property

The proviso to the resolution respecting the laws and powers of the States in relation to taxation or the lawful police regulations of the several States does not apply to and cover either the taxation of the United States or the regulation of prices to be charged by it for its operation of said property. If the United States was, prior to the adoption of this resolution, not subject itself to be taxed by a State in respect to property owned by it, or income therefrom, this proviso did not propose to enlarge the power of the State by subjecting the United States to such taxation. All it proposed to do was to protect the "existing laws or powers of the States in relation to taxation" from being impaired. The utmost which the resolution purported to do was to provide for the United States acquiring a right of temporary possession, control, and operation of the telegraph, telephone, etc., systems, for which it should pay. This still left the then owners of the prop-

erty as owners; and as between themselves and the United States, as a quasi-tenant, the owners are responsible to the State for, and bound to pay, the taxes thereon.

If the income of the corporation owning the telephone system was subject to taxation, then under this proviso whatever the United States Government pays to it for the use of the property would remain subject to the state income tax. It can claim no exemption because of its source.

So with the police regulations of the State, where the owner of a public-service corporation rents its property to another, such landlord still remains liable to the State for the observance of all police regulations in the primary and ordinary sense of that term, as contradistinguished from the wide definition sometimes given to the words "police power," and can not plead the renting as relieving it from liability. *Railroad Company* v. *Brown*, 17 Wall. 445, 450. But in this case it was the United States—a non-suable person, one not amenable to state jurisdiction—who was about to be put into possession and to operate the properties. The taking was, in a sense, compulsory and this might raise a question of the application of the rule. Hence, it was provided that such lessee in the conduct of its property should observe the regulations for the benefit of the safety, health, and morals of the community, which were considered as always resting upon the property, regardless of who was operating it. An exception, however, was made in favor of government messages, because these might be of such urgency in the direct conduct of the war, or the administration of the Government during the war, as to override all regulations, because of urgency. The other exception also points to the fact that only such police regulations as would continue to affect the duty and obligation of the owner of the property and not the interests of the United States, were continued to the States. It was important, in order to continue the

systems unimpaired in efficiency, and especially in condition to be restored in proper financial condition to the owners, that such systems should be able to finance themselves during this period where necessary under the then existing federal regulations as to bond and stock issues. Many of the States had heavy taxes on issues of securities, even renewed bonds, (*Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67), and also police regulations such as the Blue Sky Laws, intended to protect the public against overcapitalization, fraudulent stock issues, and the like. These provisions are often calculated to delay the issue of stocks and bonds even where haste is desirable. The action of these corporations was, therefore, withdrawn to this extent from the operation of the taxing laws and lawful police regulations existing at that time in the States. Doubtless the federal regulations existing were considered sufficient.

The lawful police regulations of the several States which are not affected by the resolution of July 16, 1918, are the police regulations in their strict and accurate sense, and do not embrace the exercise of powers falling under the definition of police powers in their broadest sense. It is to be noticed that Congress, while preserving from any effect of the resolution all existing laws and powers of the State in relation to taxation, did not use the words "police power." In its broadest signification, the term "police power" is practically synonymous with the States' reserved powers of sovereignty. *License Tax Cases*, 5 How. 504, 582, 583; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59. But in its primary or ordinary meaning it embraces only the power to make regulations concerning the health, safety, morals, etc., of the public. This narrower meaning is the one more often ascribed to the term. *Manigault* v. *Springs*, 199 U. S. 473, 481.

It is well settled that the police power in the primary sense cannot be bartered away. *Stone* v. *Mississippi*, 101

U. S. 814; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 597. It is equally well settled that a State or its local government when so empowered may make a binding contract divesting itself for a substantial period of time of the power to regulate rates. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 273; *Minneapolis* v. *Street Ry. Co.*, 215 U. S. 417.

The power to regulate rates is subject to the limitation that it must afford to a private owner of the utility a reasonable return on his property devoted to the public use. *Smyth* v. *Ames*, 169 U. S. 466; *Stanislaus County* v. *San Joaquin &c. Co.*, 192 U. S. 201. A State in the exercise of its police power in the primary sense may regulate a business to the point of suppression without making compensation. *Mugler* v. *Kansas*, 123 U. S. 623; *Chicago &c. R. R. Co.* v. *Milwaukee*, 97 Wisconsin, 418.

The phrase "police powers" is as familiar as the phrase "power of taxation," and the use of the word *powers* in the one instance and the omission of it in the other is extremely significant.

It seems clear that if Congress had intended to confer upon the States the power to regulate the rates at which the United States will furnish telephone service, it would not have expressed that intention by a reservation to the States of their "police regulations." One does not ordinarily think of a schedule of rates as a "police regulation." The field of police regulation in the primary sense as evidenced by statutes and city ordinances, regulating height of wires, placing of poles, etc., shows the wide field of action of the proviso as construed by the Postmaster General.

When the history of the times and necessities of the situation are considered, it should require very plain language to give to this proviso a meaning which would compel these operations to be conducted, as to the most essential feature thereof, to wit, the revenues to be de-

rived therefrom to be expended in such operations not by the President and his appointees, but under the ultimate control in each State.

It is to be noticed that this resolution was approved July 16, 1918, some months after the passage of the Federal Control Act of March 21, 1918. The States would have had no more right to regulate intrastate rates without § 10 of the Federal Control Act than they have with said section in existence. The provisions of § 10, however, are very convincing as to the meaning of § 15 and of the words "the lawful police regulations" used in said section.

The meaning of these words in § 15 of the Federal Control Act is to be taken as the meaning of the same words derived from it and written into the joint resolution of July 16, 1918. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263; *McDonald* v. *Hovey*, 110 U. S. 619, 628.

The debate on this resolution in the Senate sustains the view that the words "lawful police regulations" were used in the ordinary and primary sense.

The provisions of state statutes providing for the regulation of rates charged by private persons and corporations operating public utilities do not by their terms apply to rates charged by agents of the Government in the operation of such utilities.

Mr. Oliver E. Sweet, Assistant Attorney General of the State of South Dakota, with whom *Mr. Byron S. Payne*, Attorney General of the State of South Dakota, was on the brief, for defendant in error:

The rights of telephone companies are derived from the States. The only regulation of them in the past has been by the States, under their police powers, and the making and regulating of rates with respect to intrastate operations has always been upheld as an exercise of state police power.

The controlling purpose of Congress was to unify and utilize the telephone property for the purposes of the Government in the event of an emergency such as that which paralyzed the railroads. But there is nothing in our experience to indicate in any way that the control of intrastate rates has ever been in any way needful or desirable as an aid to the Government in the prosecution of war. Under state regulation these companies had developed and extended their operations. Their rates in effect when the resolution was passed had in many instances been established after, and as a result of, exhaustive investigations by bodies authorized by law and informed by experience. In many instances those rates had received the approval of the courts. Rates established under such circumstances were entitled to the presumption that they were reasonable and fair. The purpose, therefore, of Congress in passing the resolution could not have been primarily, or even incidentally, to enable the telephone companies in time of war to increase their earnings. The controlling consideration was to facilitate the handling of governmental business, and otherwise to coördinate their facilities with other facilities under the Government's control for the more efficient conduct of the war. The regulation of intrastate rates bears no relation to this controlling purpose; and the members of Congress who voted for the resolution and discussed it in the houses of Congress were not of the view that in passing it they were authorizing administrative officers of the Federal Government to invade the domain of States' rights. The proviso unquestionably indicates that Congress gave consideration to the question of the authority of the States. If Congress had intended that the President should have the authority to initiate rates for telephone, telegraph, cable or radio systems, it could very easily have said so. When Congress passed the Federal Control Act of March 21, 1918, it authorized the Presi-

dent, under certain conditions, to initiate railroad rates. The omission of a corresponding provision in the telephone resolution indicates the intention not to confer the power to initiate telephone rates.

This controversy centers upon the construction of the words "lawful police regulations," as used in this proviso. The defendant in error contends that this language is to be interpreted in the broad sense in which police regulations and police powers have been defined by the courts in many cases in which they have considered the nature of the power exercised by the States in the regulation of the property, affairs, and rates of public utilities.

In placing upon the exercise by the States of their police regulations the limitations that the same should not affect the transmission of government communications or the issue of stocks and bonds, it is clear that Congress did not have in mind merely regulations made for the preservation of health, safety or public morals, because regulations of that character could not possibly seriously affect transmission of government communications or the issue of stocks and bonds. When it provided these limitations upon the lawful police regulations of the States it had in mind regulations which the States might make, of a character which might naturally and appreciably affect the Government's use of wire lines or the issue of securities by the telegraph and telephone companies. What Congress had in mind, and what Congress foresaw, was the possibility that a restrictive policy of rate regulation by the States might impair the credit of wire lines to such an extent that the issuance of their stocks and bonds could not be made with reasonable assurance of finding a favorable market. Because lawful police regulations is a term sufficiently broad to comprehend, not only rate regulations, but service requirements, Congress added the provision that such regulations should not affect the transmission of government communications. An unwise

policy in the regulation of rates by States might result in such a depletion of revenues as to prevent proper maintenance; or unwise requirements as to the furnishing of service for the public might interfere with the proper and necessary use by the Government for the handling of official communications. Such a purpose was entirely consistent with the main purpose of the Government in asking for control and operation during the war. The telephone companies would be greatly interested in the rates and classifications of their service in effect at the time of the termination of federal control, but during federal control the Government was to guarantee just compensation. How the Government should make good its guaranty was a matter of fiscal policy and not a matter of control or operation of the lines. In making such a guaranty the Government assumed an obligation, just as it has assumed many other obligations during the war, which it will be obliged to pay by revenues derived from one source or another. It is certain, at least, that the efficiency of governmental supervision, control or operation was not in the remotest degree dependent upon the manner in which the Government should raise the money to make its guaranty good. Congress did not say in the resolution that the funds to meet the guaranty should be raised by rates to be established by the Postmaster General. That, however, is the provision which the plaintiffs in error are now undertaking to read into the resolution by construction and interpretation. That is the only basis for their contention that the President or the Postmaster General has, or ever had, any authority to increase or otherwise regulate the rates or charges of telephone systems under federal control.

The resolution is in no sense a revenue measure. It was not passed with the legal formalities necessary in the passing of a revenue law. Nevertheless, if it means all that the plaintiffs in error contend, it is a revenue measure,

because, under their interpretation, it authorizes the collection of revenues with which the Government shall make good its guaranty of just compensation to the owners of the wire lines under its control. It is not necessary to invent any complicated construction of this language. It says that the lawful police regulations of the States shall not be affected. It was passed at a time when, under their police powers and by means of police regulations, the States had been exercising effective control over telephone companies for years.

It is a most natural assumption that if Congress had intended to completely revolutionize these conditions and the relations of the States to these utilities which they had created, Congress would unquestionably have made that intention very clear by appropriate language in the resolution. There was no occassion for inserting the term "lawful police regulations" except to assert that Congress proposed to exercise only the recognized and conceded powers of the Federal Government.

In the decisions of the courts the terms "police powers" and "police regulations" are used interchangeably and indiscriminately in many cases. If any distinction whatever is recognized it is that police regulations relate to the exercise of police powers and that through police regulations police powers are applied. We do not find in the books any authority for any other difference in the significance of these terms. *Wisconsin ex rel. Attorney General* v. *Chicago & North Western Ry. Co.*, 35 Wisconsin, 425, 591; Cooley's Constitutional Limitations, 577, 851; 31 Cyc. 903; *Smyth* v. *Ames*, 169 U. S. 466; *Hammer* v. *Dagenhart*, 247 U. S. 251; Fuller, Interstate Commerce, p. 17; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372.

The term "lawful police regulations," as it appears in the joint resolution, has been construed in accordance with the contention of the defendant in error in decisions

rendered in the following, among other cases: *Public Service Commission of Indiana* v. *Receivers of the Central Union Telephone Co.*, Circuit Court Marion County, Indiana, decided February 21, 1919; *Indiana* v. *Indianapolis Telephone Co.*, decided in same court on same day; *Commonwealth ex rel. Attorney General* v. *Bell Telephone Co. of Pennsylvania*, Court of Common Pleas, Dauphin County, Pennsylvania, decided January 29, 1919; *Illinois* v. *Chicago Telephone Co.*, Superior Court, Cook County, Illinois; *Ohio* v. *Ohio State Telephone Co.*, Court of Common Pleas, Franklin County, Ohio, decided January 25, 1919; *Mississippi ex rel. Collins, Attorney General*, v. *Cumberland Telephone & Telegraph Co.*, 81 So. Rep. 404. A broad and liberal construction should be made of these words and of the proviso in which they are contained. The joint resolution, as a whole, is a grant of power by Congress to the President; the concluding proviso in the resolution is a limitation to that grant. It is usual that grants of power by legislation are strictly construed. Governments of enumerated and limited jurisdictions and officers possessing only powers delegated by law, are confined within the limits of the acts defining their powers. *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238. It is not reasonable to assume that, by making the President the general supervisor of the telephone lines, Congress intended to confer upon him, except in the matter of facilitating government communications, any greater rights in his relationship with the public than those which the telephone companies themselves possessed. We believe that there is the same need of local rate regulation and supervision by local authorities when the business is carried on by the Federal Government as when carried on by telegraph or telephone companies whose properties extend over the entire nation. This principle has been recognized when applied to railroads incorporated under federal law. *Smyth* v. *Ames*,

169 U. S. 466; *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413.

That the power to make and regulate rates of wire lines is a power which cannot be inferred but must be positively conferred by unambiguous language, is a proposition supported by many authorities. In *Reid* v. *Colorado*, 187 U. S. 137, the court said: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested."

Congress cannot control intrastate rates under the commerce clause; nor under its war power, except when necessary and proper as a war measure. As in the case of enactments of Congress, so in the case of official acts of the President, it lies within the jurisdiction of the courts to determine whether the same are necessary and proper for carrying into execution any of his constitutional authority. *Mitchell* v. *Harmony*, 13 How. 115.

The only possible necessity for increasing the revenues of telephone companies that appears in this case is the necessity for the raising of revenues to enable the Government to compensate the telephone companies for the use of their property. That is not a war purpose. Plainly, the concluding proviso in the resolution indicates that in the opinion of Congress there existed no military necessity for increasing telephone toll rates. The President did not proclaim that it was needful or desirable to increase intrastate telephone rates as a war measure. Neither did the Postmaster General recite that such increases in telephone rates were necessary, or that they contributed in any way to the successful prosecution of the war. Such declaration or recital would not necessarily have determined the fact; if made, it would be the duty of the court in a proper proceeding to go behind such recitals, for otherwise it would be impossible to check the exercise of

arbitary power. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620; *Degge* v. *Hitchcock*, 229 U. S. 162, 171; *United States* v. *Lee*, 106 U. S. 196.

If the President undertook to control telephones by virtue of the war powers, the fact is that the exercise thereof, which it is the object of this case to test, was not undertaken until a time had arrived when the highest authorities of the Federal Government itself acknowledged that the war had ended. President's Messages of November 11, and December 2, 1918; *Pacific Lumber Co.* v. *Northwestern & Pacific R. R. Co.*, 51 I. C. C. 738; *United States* v. *Hicks*, 256 Fed. Rep. 707. These considerations have no bearing on the construction to be made of the joint resolution, but they have an important bearing upon the contention of the defendant that the Postmaster General's order of December 13, 1918, effective January 21, 1919, has any warrant as a war measure. Even if Congress might authorize the President to change and increase South Dakota intrastate rates under the war powers of Congress and the President, still no attempt was made to exercise such power during the war or pursuant to any war purpose or in accordance with any plan for prosecuting the war. The Postmaster General did not promulgate his order until after all necessity for the regulation of such rates as a war measure had passed.

Congress cannot confer legislative power upon the President to make rates for the future. *Field* v. *Clark*, 143 U. S. 649, 692, 693.

The suit is not one against the United States, the President or the Postmaster General; and its purpose was not to control revenue or property of the United States. The defendants are wrongdoers, and cannot defend upon the ground that they acted under orders which the President or Postmaster General was without authority to issue.

It is within the power of the court to determine the

limits of executive authority, and to restrain acts in excess thereof. This suit is not one to control administrative discretion, but to restrain acts in threatened violation of law and in excess of legal authority. *Ex parte Milligan*, 4 Wall. 2, 120, 121; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643, 644; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620.

The acts of the telephone companies sought to be enjoined are not acts of the Federal Government, because beyond its powers. It is not sought in this case to control the President's discretion, because it relates to a matter wholly beyond his jurisdiction.

Mr. William I. Schaffer, Attorney General of the Commonwealth of Pennsylvania, and *Mr. Bernard J. Myers*, Deputy Attorney General of the Commonwealth of Pennsylvania, by leave of court filed a brief as *amici curiæ*, on behalf of the Commonwealth of Pennsylvania.

Mr. Charles E. Elmquist, by leave of court, filed a brief as *amicus curiæ*, on behalf of thirty-seven States and the National Association of Railway and Utilities Commissioners.

Mr. John J. Blaine, Attorney General of the State of Wisconsin, *Mr. M. B. Olbrich*, Deputy Attorney General of the State of Wisconsin, and *Mr. Joseph E. Messerschmidt*, Assistant Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ*, on behalf of the State of Wisconsin.

Mr. Hal H. Smith, *Mr. David H. Crowley* and *Mr. Clarence D. Wilcox*, by leave of court, filed a brief as *amici curiæ*, on behalf of the City of Detroit.

Mr. H. Findlay French and *Mr. Ogle Marbury*, by leave of court, filed a brief as *amici curiæ*, on behalf of the

Protective Telephone Association of Baltimore City, Maryland, *et al.*

Mr. Albert C. Ritchie, Attorney General of the State of Maryland, by leave of court, filed a brief as *amicus curiæ*, on behalf of the State of Maryland.

Mr. Chief Justice White delivered the opinion of the court.

Involving as this case does the existence of state power to regulate, without the consent of the United States, telephone rates for business done wholly within the State over lines taken over into the possession of the United States and which by the exercise of its governmental authority it operates and controls, it does not in principle differ from the *North Dakota Case* just announced [*Northern Pacific Ry. Co.* v. *North Dakota*, *ante*, 135,] where it was decided that under like conditions the State had no such power as to railroad rates. We consider this case as far as may be necessary, by a separate opinion, however, because the authority under which the control was exerted is distinct and because of the assumption in argument that this distinction begets a difference in the principles applicable.

In January, 1919, the State of South Dakota on the relation of its Attorney General and Railroad Commissioners sued the Dakota Central and other telephone companies doing business within the State to enjoin them from putting in effect a schedule of rates as to local business which it was alleged had been prepared by the Postmaster General and which it was averred the telephone companies were about to apply and enforce. It was charged that such rates were higher than those fixed by state authority and that the proposed action of the companies would be violative of state law, since the companies were under the

duty to disregard the action of the Postmaster General and apply only the lawful state rates. The duty of the relators, as state officers, to prevent such wrong was alleged,—a duty in which, it was further asserted, the State had a pecuniary interest springing from the expenditure which it was obliged to make for telephone services.

The companies answered, disclaiming all interest in the controversy on the ground that by contract, a copy of which with one of the defendant companies was annexed, their telephone lines and everything appurtenant thereto had passed into the possession and control of the United States and were being operated by it as a governmental agency. The answer also alleged that any connection of the companies through their officials or employees with the business was solely because of employment by the United States. The purpose to enforce the rates fixed by the Postmaster General was admitted and it was averred that the suit was one over which the court had no jurisdiction because it was against the United States.

The case was heard on the bill, answer, exhibits and an admission by all the parties that the contract annexed to the answer was accurate and that a similar one had been made with all the other defendants.

Assuming that Congress had power to take over the telephone lines; that it had conferred that power upon the President; that the power had by the President been called into play conformably to the authority granted, and that the telephone lines were under the complete control of the United States, the court yet held that the State had the power to fix the local rates. In reaching this conclusion the court, assuming argumentatively that the right which the United States possessed gave at least the implied authority to fix all rates, nevertheless held that such power did not embrace intrastate rates because they had been carved out of the grant of power by Congress in conferring authority on the President. It was

therefore decided that the President, the Postmaster General and those operating the telephone service under his authority were mere wrongdoers in giving effect to the rates fixed by the Postmaster General and in refusing to enforce the conflicting intrastate rates made lawful by state law. The proceedings to prevent this wrong, it was held, did not constitute a suit against the United States and the injunction prayed was granted.

The appellees do not confine their contention to the question of statutory construction below decided. On the contrary, they press questions of power which the court below assumed and did not pass upon, and insist upon a construction of the statute contrary to that which the court below took for granted as a prelude to the question of construction upon which it based its conclusion.

We must dispose of the issues thus insisted upon before testing the soundness of the interpretation of the statute upon which the court below acted, and for the purpose of considering them as well as the question of construction which the court below expressly decided, we state the case.

On the 16th of July, 1918, Congress adopted a joint resolution (40 Stat. 904, c. 154), providing:

"That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided*, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; . . .

Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

Six days thereafter, on the 22nd of July, the President exerted the power thus given. Its exercise was manifested by a proclamation which, after reciting the resolution of Congress, declared:

"It is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable;

"Now, Therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General. . . ." [40 Stat. 1807.]

The proclamation gave to the Postmaster General plenary power to exert his authority to the extent he might deem desirable through the existing owners, managers, directors or officers of the telegraph or telephone lines, and it was provided that their services might continue as permitted by general or special orders of the Postmaster

General. It was declared that "from and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice."

Under this authority the Postmaster General assumed possession and control of the telephone lines and operated the same. On the 31st day of October, 1918, the President through the Postmaster General, in the execution of the duty imposed upon him by the resolution of Congress to make compensation, concluded a contract with the telephone companies of the most comprehensive character covering the whole field while the possession, control and operation by the United States continued. By its terms stipulated amounts were to be paid as consideration for the possession, control and operation by the United States and the earnings resulting from such operation became the property of the United States. Although concluded in October, 1918, by stipulation the contract related back to the time when the President took over the property.

Following this, by authority of the President, the Postmaster General fixed a general schedule of rates and it was the order to put this schedule in effect which gave rise to the suit, the trial, and the resulting judgment which we have now under consideration.

That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the *North Dakota Railroad Rate Case*. And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him.

The proposition that the President in exercising the power exceeded the authority given him is based upon two considerations. First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.

The second contention, although it apparently rests upon the assertion that there was an absence of power in the President to exert the authority to the extent to which he did exert it, when it is correctly understood amounts only to an asserted limitation on the power granted based upon a plain misconception of the terms of the resolution of Congress by which the power was given. In other words, it assumes that by the resolution only a limited power as to the telephone lines was conferred upon the President, and hence that the assumption by him of complete possession and control was beyond the authority possessed. But although it may be conceded that there is some ground for contending, in view of the elements of authority enumerated in the resolution of Congress, that there was power given to take less than the whole if the President deemed it best to do so, we are of opinion that authority was conferred as to all the enumerated elements and that there was hence a right in the President to take complete possession and control to enable the full operation of the lines embraced in the authority. The contemporaneous official steps taken to give effect to the resolu-

tion, the proclamation of the President, the action of the Postmaster General under the authority of the President, the contracts made with the telephone companies in pursuance of authority to fix their compensation, all establish the accuracy of this view, since they all make it clear that it was assumed that power to take full control was conferred and that it was exerted so as to embrace the entire business and the right to the entire revenues to arise from the act of the United States in carrying it out. Indeed, Congress in subsequently dealing with the situation thus produced would seem to have entertained the same conception as to the scope of the power conveyed by the resolution and dealt with it from that point of view. Act of October 29, 1918, c. 197, 40 Stat. 1017.

This brings us to the proposition upon which the court based its conclusion, that is, that although complete possession, exclusive control, and the right to all the revenues derived from the operation of the business were in the United States as the result of the resolution, the proclamation, and the contracts, yet as to intrastate earnings, the state power remained to "encumber" the authority of the United States, because that situation necessarily resulted from the terms of the congressional resolution.

This superficially was based on an interpretation of the resolution, but in substance was caused by the application to the clause of the resolution interpreted, of the erroneous presumption as to the continuance of state power dealt with in the *North Dakota Case*. Let us see if this is not necessarily so. The provision dealt with was the proviso of the resolution which in the first place saved "the lawful police regulations of the several States" and therefore subjected the control of the United States to the operation of such power; and in the second place prohibited the States during the United States control from exerting authority as to the issue of stocks and bonds.

It was conceded that the words "police power" were

susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people. Although it was admitted that the reservation, considered intrinsically, was not susceptible of being interpreted in the broader of the two lights, it was held that it was necessary to so interpret it because of the clause of the proviso prohibiting the States from legislating concerning the issue of stocks and bonds by the companies during the United States control. The reasoning was this: It was inconceivable, it was said, that the subject, stocks and bonds, should have been withdrawn from state control by an express prohibition unless that subject would have been under state control in the absence of the prohibition, a result which could only exist by giving the saving clause as to police power its widest significance. But the fact that the rule of construction applied had the result of incorporating in the act of Congress unlimited state authority merely as the result of a prohibition by Congress against the exertion of state power in a specific instance, in and of itself admonishes of the incorrectness of the rule. But its want of foundation is established by two further considerations: (1) because it causes the provision as to stocks and bonds, which was plainly enacted to preserve the financial control of the United States over the corporations, to limit if not destroy such control; (2) because by converting the prohibition against state power into an affirmative and comprehensive grant of that power, it so interprets the act as to limit the grant of authority which the act beyond doubt gave to the United States. These considerations not only show the mistake of the interpretation, but also point out the confusion and conflict which must necessarily arise from giving effect to the mistaken presumption of the continuance of state power to which we have previously referred.

Inherently the power of a State to fix rates to be charged for intrastate carriage or transmission is in its nature but derivative, since it arises from and depends upon the duty of those engaged in intrastate commerce to charge only reasonable rates for the services by them rendered, and the authority possessed by the State to exact a compliance with that duty. Conceding that it was within the power of Congress, subject to constitutional limitations, to transplant the state power as to intrastate rates into a sphere where it, Congress, had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency, it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States, that is, its authority to fix rates for the services which it was rendering through its governmental agencies. The anomaly resulting from such conditions adds cogency to the reasons by which in the *North Dakota Case* the error in presuming the continuance of state power in such a situation was pointed out and makes it certain that such a result could be brought about only by clear expression or at least from the most convincing implication.

This disposes of the case, but before leaving it we observe that we have not overlooked in its consideration the references made to proceedings in Congress concerning the resolution at the time of its passage, and further, that we have also considered all the suggestions made in the many and voluminous briefs filed on behalf of various state authorities and individuals having interests in suits pending elsewhere, concerning the construction of the resolution. In saying this, however, we must except suggestions as to want of wisdom or necessity for conferring the power given, or as to the precipitate or uncalled for exertion of the power as conferred, from all of which we have turned aside because the right to consider them was wholly beyond the sphere of judicial authority.

In view of our conclusion we shall in this case, as we did in the previous one and for the reasons therein stated, content ourselves with reversing the judgment below upon the merits with directions for such further proceedings as may be not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE BRANDEIS dissents.